Two Faces of Federalism

An Outline of an Argument about Pluralism, Unity, and Law

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ROBERT M. HUTCHINS

Followed by a Discussion

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The work of the Center is directed at clarifying basic questions of freedom and justice, especially those constitutional questions raised by the emergence of twentieth century institutions. Among the areas being studied are the economic order, the political process, law, communications, war as an institution, the American character. "Two Faces of Federalism" is the product of a continuing inquiry into our form of government. Discussion of this paper among the Consultants and staff members of the Center, an edited version of which appears in this pamphlet, took place during a month-long meeting at the Center in the summer of 1960.

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Center for the Study of Democratic Institutions
Santa Barbara, California

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FOREWORD

This paper has grown out of discussions which have been held at the Center for the Study of Democratic Institutions over the past year. We have talked about federalism as the theory by which a political community organizes its parts and the groups within it, and about the differing ways in which this theory has been viewed in America.

The effort in the first part of the paper is to indicate two possible views of limited government—one in which limited government is regarded as restricting the power of the state and its sphere of interest; the other being simply limitation to certain objects on which the community more or less consciously agrees. The suggestion is that both these approaches to limited government have very serious difficulties. The paper continues with the arguments surrounding the questions: How much pluralism can a society stand? How much unity does it have to have? What are the standards for determining what it ought to do? If neither the will of the dominant group nor the will of the majority nor what the courts will do is an adequate definition of a standard that can command the allegiance of a relatively intelligent country, then what is that standard?

The paper was presented for discussion in August 1960 during a month-long meeting of the Consultants to the Center. An edited version of their talk takes up the major portion of the pamphlet.

R. M. H.

Two Faces of Federalism

I

The usual emphasis of the phrase "limited government" is on the restriction of the sphere of the state. This restriction is justified either by the incompetence of the state and its consequent lack of jurisdiction, as in religious matters, or by a preference for private as against public action, as in economic matters.

The restrictive connotation of the phrase "limited government" is not the only possible one. A constitution that directs the community to work toward certain objects in certain ways limits the government in the sense that the constitution inhibits the pursuit of other objects or the use of other means. In this sense any written constitution limits the government, for it is inconceivable that the framers would content themselves with the gratuitous remark that the people could pursue any objects by any methods that appealed to them.

The first way of talking about limited government, which emphasizes restrictions on government, is supported in the name of individual freedom, which is thought to result from immunities against government. So Mark DeWolfe Howe says,[1] "As I read the original Constitution and its Bill of Rights it expounds a political theory which is grounded in the belief that liberty is the by-product of limitations on governmental power, not the objective of its delegation. . . . These distinctions I believe to be of profound importance. When they are forgotten we begin to use the word 'rights' and the phrase 'civil liberty' in misleading ways. Our rights, as the framers conceived them, were essentially certain specified immunities. They were not claims on, but assurances against the government. . . . The Bill of Rights defines our immunities; it does not catalogue our claims."

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[1] In an unpublished paper prepared for the Fund for the Republic.

In this view the role of the state is to "secure," that is, to defend and not to interfere with those basic rights which existed before the state, and any other rights that the individual acquires later. For the further protection of the freedom of the individual against government many centers of power that may compete with government are desirable. But freedom may demand protection against them, too. Freedom occurs in the interstices among these centers and in the regions they are prohibited from entering.[2] Only a pluralistic society can be free.[3]

The second way of talking about limited government, which emphasizes limitation to certain means and ends, is supported in the name of political liberty. This is liberty under law. If the laws are just in their object, adoption, and execution, the society is free. Democracy is the most completely just form of government because democracy calls for the consent and participation of the people in the passage of the laws and the processes of their execution.

In this view, neither democracy nor freedom requires the existence of independent or quasi-independent centers of power. Their existence is a matter of expediency. The state, after con-

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[2] "If that collective force, the State, is to be the liberator of the individual, it has itself need of some counterbalance; it must be restrained by other collective forces, that is, by . . . secondary groups . . . it is out of this conflict of social forces that individual liberties are born." E. Durkheim, *Professional Ethics and Civic Morals,* The Free Press, 1958, pp. 62-63. Quoted in W. Kornhauser, *The Politics of Mass Society,* The Free Press, 1959, p. 79.

[3] See, on the other hand, "The flush of enthusiasm for political pluralism as a defence against the omnicompetent State has waned considerably as the realities of the 'essentially associative age' have become more apparent. Political pluralism has, indeed, run much the course that Ernest Barker predicted in his essay *The Discredited State.* On the one hand, the uncomplicated faith of Figgis and the early Laski in social groups as the nursing ground of individuality and the ultimate defence of individual freedom has given way to a realization that the group can in some circumstances be more dangerous to individual freedom than the State. On the other hand, fear of the omnicompetent State has in the United States become less influential in both popular and academic political thinking than the fear that the State may become merely the tool of the groups or interests which for the time being are in a position to influence its legislative or administrative machinery." L. C. Webb, "Pluralism and After," in *Legal Personality and Political Pluralism,* ed. by L. C. Webb, The University Press, Melbourne, 1958, p. 190.

sidering whether or not laws should be passed governing institutions, might decide that it was best not to have any governing some, or to have the laws that did govern them restricted to such matters as their property and their public conduct.[4]

It will be observed that such conclusions are not dictated by lack of power, interest, or competence on the part of the state. Nor do they result from any limitations inherent in the nature of law. These limitations are simply that law must be just, general, enforceable, and confined to the regulations of external acts. The pluralistic organization of society would not be required by justice or freedom; it would rest on the judgment, politically and democratically arrived at, that this organization was the most advantageous at the time. The reciprocal range of public and private action might vary with the circumstances.

It may be argued that history shows that such a formula will fail. Governments become corrupt, and democratic governments are no exception to the rule. On the other side, it may be said that the reason why democratic governments become corrupt is that they have evaded the responsibility of defining governmental duties, have left to the invisible hand the direction of the community to the common good, and have conceived government's function as that of composing differences among pressure groups. This has eliminated jurisprudence from law and thwarted the political process. Law becomes the command of the sovereign or whatever courts will do. Politics becomes deals.

The argument presents two faces of federalism, if I may be per-

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[4] The resulting structure might be something like that which John Maynard Keynes proposed in his pamphlet, "The End of Laissez-Faire," published in 1926. He said, "I suggest, therefore, that progress lies in the growth and recognition of semi-autonomous bodies within the State—bodies whose criterion of action within their own field is solely the public good as they understand it, and from whose deliberations motives of private advantage are excluded, though some place it may still be necessary to leave, until the ambit of men's altruism grows wider, to the separate advantage of particular groups, classes, or faculties—bodies which in the ordinary course of affairs are mainly autonomous within their prescribed limitations, but are subject in the last resort to the sovereignty of the democracy expressed through Parliament. I propose a return, it may be said, towards mediaeval conceptions of particular autonomies."

mitted to extend the word beyond its ordinary meaning to refer to the theory by which a political community organizes its component parts and the groups within it. The first face is that attractive to those who are primarily concerned with protection. This is to be obtained through constitutional declarations affirming the citizen's rights and through constitutional restrictions on governmental power. These limitations develop and follow from the major premise of minimal government. This face of federalism shows us government balancing government and branch of government checking branch of government. The scope of government is such as to leave a wide field to voluntary associations, which act as a restraint on government and on one another. The mutual frustration of the centers of power is the guarantee of individual freedom.

Another face of federalism is seen by those who are primarily concerned with achievement. When something has to be done, a judgment has to be made about who shall do it. All hands agree on the value of individual and group effort, spontaneity, and experimental activity. Hence the first question will be whether the people can do for themselves what ought to be done. If the obstacles to the action of individuals and groups will prevent what ought to be done from being done, or done as well, then there is no objection in principle to having the government do it. Objections must run to the current, but presumably corrigible, defects of governmental machinery.

Both faces of federalism have been visible throughout American history, and we need them both. No sensible person would want to do without protection; none, no matter what he says, wants to have government limited to a police function. One purpose of this paper is to suggest that though there are two, and two equally necessary, faces of federalism, we often create difficulties for ourselves by talking as though there were only one, the first. It is probably fair to say that, though the first has dominated our way of talking, the second has described our way of acting. The Constitutional Convention, in spite of the limitations of its mandate, proceeded, under the pressure of events, to construct a stronger central government. Daniel Webster said of the Constitution, "It

had its origin in the necessities of disordered finance, prostrate commerce, and ruined credit." Jefferson in his First Inaugural announced that the federal government was to confine itself to restraining men from injuring one another. "This," he said, "is the sum of good government, and this is necessary to close the circle of our felicities." Yet the greatest achievement of his administration was made possible by ignoring this slogan. From the Civil War to the New Deal, and now in the midst of the Cold War and overwhelming technological change, no matter what we have said about free enterprise and freedom of contract and the virtues of minimal government, we have developed and are developing a central government that is far from minimal.

In a speech at George Washington University on March 28, 1960, entitled "Toward National Federalism," Senator Joseph S. Clark said, "The deliberate expansion of Federal aid runs counter to all that all of us learned in school about the concepts underlying American federalism. It runs counter to what Mr. John Kenneth Galbraith calls the 'conventional wisdom.' Decentralization, home rule, local self-reliance, government close to the people, States' rights, 'that government is best which governs least'—all of the slogans and symbols of the American tradition are against my proposition. . . . Our traditional concept of federalism—outmoded in the last century by the nationalization of our economy and in this century by the urbanization of our society—is a case of political lag which urgently deserves our attention."

Those who remind their fellow-countrymen of the second face of federalism must admit that it is disordered and obscure because it has been formed, as Senator Clark suggests, by the exigencies of history rather than by theory and design. They can argue, however, that the time for the construction of theory and design is at hand and that the doctrine of liberty under law provides the basis for the undertaking. This theory might run as follows: the root of present error lies in the distinction between society and state; this distinction is in fact and theory negligible; the political community is and should be charged with the responsibility for the common good; the conflicting claims of individuals and groups cannot be fought out among the competitors with government acting as a

referee; decisions must be made and policies formulated by the political process; although associations may be formed for purposes contributing to the common good, the political community is entitled to hold these associations to their purposes.

In accordance with this theory, the principle of federalism, instead of being a means by which government is paralyzed so that the individual may be free, would become a rule by which functions were allocated to governments, corporations, associations, and individuals. The process of allocation would be constitutional and political; that is, according to law. This theory would be a theory of limited government.

Those who look with favor upon the first face of federalism and who are primarily concerned with protection from arbitrary power must concede that in the present circumstances the power of government and the range of law are being and must be greatly extended. Those who look with favor upon the second face of federalism and who seek social achievement must concede that the record of governmental performance is not reassuring. The purification of the political process and the understanding of law, to say nothing of the development of theory, must accompany any proposals to make this face of federalism predominant. To permit the present government of this country to set and enforce standards for universities and churches, for example, would be to risk the life and purpose of these institutions. The question is whether the corruption of government and politics is inevitable or whether intelligence and resolution can prevent it.

The difficulties in taking either of the two positions outlined above have led some European thinkers to take a third, which is, in effect, to abandon politics – and federalism. The position involves the abandonment of democracy and of any democratic notion that participation in politics is desirable for the individual or the community to which he belongs. It involves a vast extension of the realm of privacy, the determined defense of that realm against all outsiders, and a retreat as complete as possible into that realm on the part of the citizen, who would emerge from it only at periodic intervals to express his general satisfaction or dissatisfaction at the polls. The government would be in the hands of an

élite, on the principle that the world is now so complicated and precarious that the people cannot understand it and cannot be trusted with it.[5] What they can understand and manage is their private interests. They can understand the degree to which the government, the main function of which is to keep order, succeeds in doing so without interference with those interests.

Apart from the practical difficulties of drawing a line between public and private, as evidenced by such a question as the incidence of taxation for the common defense, and apart from theoretical problems to be mentioned in a moment, this program has some attractions. It promises protection to individual freedom against government and its bureaucracy. It purports to meet the problems of war and technological change by putting them in competent hands. It retains the notion of government by consent. The government would presumably be for the people and, in a sense, of the people.

But it would not be by the people. Admitting that the people in any "indirect" democracy or republic do not literally perform all the acts of government, we can still see that there is a difference

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[5] See *contra*, "A government of technicians, trained and dedicated to the greater good of their subjects, taking the load of political decision off the shoulders of the ordinary voter, may seem an attractive idea. But it rests on two basic fallacies. In the first place it implies that politics is an exact science, in which ascertainable means can secure obviously desirable ends. This is not true: there is little agreement on the ends any government should serve, none at all on the means it may use to achieve them, and no clear distinction between ends and means. More dangerously, the argument implies that the function of government is to perform certain necessary but unpleasant duties as quickly and painlessly as possible, and then get out of the way and leave people alone. This, it is true, was the classic nineteenth-century conception of the 'night-watchman state' and is therefore historically connected with our own ideas of political democracy. Recently, however, it has probably done them more harm than good. For as Miss [Hannah] Arendt points out, political freedom is freedom to act, and political democracy is the machinery through which the citizen acts to change his own or other people's conditions of life. Thus the duties of a state change in step with the changed beliefs and aspirations of its citizens; they cannot hire a government to do their aspiring for them. This, then, is the case for the defence of our democratic system; but it is at the same time a criticism of it, which must be met by a reform of our political thinking." *The Times Literary Supplement* (London), August 26, 1960, p. 545.

between a form of government in which the people participate only to the extent of throwing the rascals out and one in which the interaction among the people, their elected representatives, and the administration determines the substance and direction of public policy. Democracy appears to require this participation of the people and to be in part defined by it.

The view that we are now discussing amounts to saying that democracy should not be attempted in the modern world. The difficulties that democracy is having everywhere lend some credence to this opinion. The supporters of democracy must base their answer on the proposition that it is the most just form of government, since justice requires self-government, and that it is in any event the most desirable, since it rests on the wisdom of the people, which extends to a vision of the common good, and a better vision than any man or group of men is likely to have. If a form of government is demonstrably more just than any other, it should not be abandoned; every effort should be made to achieve the closest approximation of it that is possible in the historic circumstances of time and place. If a people does not appear to be capable of self-government, the aim of self-government should not be given up. The first priority is to do everything possible to develop the wisdom of the people through communication, education, and law. The problem is not to figure out alternatives to democracy, but to make it work. Only interim alternatives can be considered: those which are explicitly regarded as milestones along the way.

II

A political community seems to be a collection of people commonly pursuing some political purpose, that is, some idea of the terrestrial aims of their common life. What they aim at in common is the common good. This good is a good of each member of the community, accruing to him only because he is a member. It is a good that he would not have if the community did not exist. The traditional components of the common good are peace, order, freedom, and justice. A political com-

munity, then, is one that is directed to these ends, and the best community is the one best directed to them.

A state in which the people see only the first face of federalism and are primarily concerned about protection from government, where the slogan is "that government is best which governs least," runs the risk of not being a political community. The conception of the government as a night-watchman in a society composed of independent centers of power almost inevitably leads to the conception of politics as deals. It is possible to conceive of a state in which individuals and groups seek the common good as they see it, rather than their own selfish advantage, but it is impossible to suppose that they can all be right or that the clash among them will add up to the common good. The problem of a state that is both formally and empirically pluralistic is the problem of unity.

This problem is a modern one, unknown to Greek political theory, where the distinction between society and state was not made and where it was taken for granted that the people would be united in the common pursuit of happiness, the life attained through virtue. The argument was not about the end, but only about the means to it. The prevailing notion today is that the state is a necessary evil that must be prevented from interfering with the pursuit of our individual ideas of happiness or at most a necessary instrument that should supply us with the material and social conditions that we need to pursue those ideas.

The modern argument about unity is about its range and depth. To what extent must there be agreement about ends? Clearly a people has to be united about something. Their common location on a stretch of territory does not make them a people. They must as a minimum owe common allegiance to laws, customs; and political institutions.

On the one hand, it is argued that agreement on this point is enough. On the other hand, it is said that if a people is to achieve this minimal unity, it must be united on a range of deeper subjects. Why should individuals and groups seek the common good rather than their own selfish advantage? The answer must be ultimately supplied by some notion of the nature of man. To have a durable political community must all the citizens, or a majority

of them, have the same view of the nature of man?[6] A negative answer cannot be supported by saying that the United States has endured in spite of widespread disagreements on this issue, because it may be that we are held together by the remnants of an inherited agreement.

For any kind of common life or action there must be some consensus. This word sometimes refers to an historical or present state of affairs, as when we say that the consensus is that we must support the farmers; but it is also used as the standard by which we judge political action and judicial decision, as when Justice Frankfurter says that the consensus is the standard of due process.[7]

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[6] "The idea that any society can subsist without an agreement upon fundamentals is, of course, a delusion. But it is peculiarly true of a republican society, where the opinion of all the people enters into the government. Every 'agreement to disagree' presupposes a prior agreement with respect to which disagreement can *not* be tolerated. According to Lincoln, it was intolerable that the American people disagree upon the principle of the abstract equality of all men. Insofar as they did so they were no longer one nation. . . . Free government, according to Lincoln, was not the mere *process* of arriving at decisions without coercion by any formula embodying the principle of majority rule. It was not even government of, by, and for the people. It was government of, by, and for a people *dedicated* to a certain proposition." Henry V. Jaffa, *Crisis of the House Divided,* Doubleday; 1959, pp. 335, 348. Cf. Bertrand de Jouvenel in an unpublished paper prepared for the Center for the Study of Democratic Institutions, July 1960: "It is a very important matter to make up our minds whether the civil society we live in is to be thought of as dedicated to a purpose. If so, our institutions do not correspond. Personally my feeling is that civil society should not be regarded as dedicated. . . . On the other hand, we may reasonably think of the administration as a dedicated body from which we 'get' good public service just as we 'get' science from the republic of scientists. This perhaps is not a morally pleasing picture (though I would say in favor of such a state of affairs that *it allows us to join dedicated societies of our own choice,* which would not be the case if civil society were a dedicated body) but it seems to me to fit the facts. Certainly there is not the least implication in our institutions and mores that a man must make himself into a partner of a general purpose." Cf. the remark of Edmund Burke that the state is a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection.

[7] *Louisiana v. Resweber,* 329 U.S. 459, 1947. For what appears to be another test of due process, "the balance of individual hurt and the justifying public good," see Frankfurter, J., concurring in the result, *Hannah v. Larche,*—U.S.—, 4 L ed 2d 1307, 1353, decided June 20, 1960. This view is attacked by Douglas, J., dissenting, at p. 1363.

Consensus in the first usage, a statement of the general opinion, is neither very difficult nor very important. The second usage, consensus as a standard, is more complicated. Justice Holmes seemed to feel that the standard had been met if legislation reflected the will of the dominant group in the society. Judge Learned Hand assimilated the second usage to the first by employing the standard of the majority will or the prevailing mores of the community. To A. A. Berle, Jr.,[8] the consensus is a kind of inarticulate major premise in a society. He says it is "commonly held attitudes and common habits of action." These attitudes and habits are not always expressed in law, but they may be at any time, under the provocation of some episode that shows that the force of positive law is needed to make the practices of the community conform in a specific case to the tendencies of its attitudes and habits. The consensus is the consensus of a particular social group. The consensus may be either good or bad. It is constantly changing. For these reasons—its lack of universality, moral quality, and permanence—it cannot be equated with the natural law. The natural law, according to Berle, is an "ideal conception," the special province of saints, philosophers, and other gifted critics who may appraise and eventually modify the consensus of their societies by measuring it against the principles of natural law. But the rough human standard of political action from day to day is the common attitudes and habits of the group.

John Courtney Murray, S.J.,[9] identifies the consensus with the tradition of the West, the central element of which is, in his view, the natural law. Father Murray holds that the general opinion, or the will of the dominant group, or the majority view, or the mores of the community, or its commonly held attitudes and habits of action do not measure up to the requirements of the idea of consensus, if that idea is to be used as the standard of political action. The natural law is based on the nature of man. It is not necessary to believe in the existence of God or to understand His nature in order to work out and act upon a theory of natural law. Nor is it

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[8] In an unpublished paper prepared for the Center for the Study of Democratic Institutions, July 1960.

[9] *We Hold These Truths,* Sheed & Ward, 1960, p. 97.

necessary, or desirable, to conceive of the natural law as unchanging.[10] The nature of man may change. In any event, we understand the nature of man better as we gain more knowledge. Still less is it desirable to think of natural law as providing easy, automatic answers to questions of judicial interpretation, legislation, or moral conduct. If, for example, the Ten Commandments are taken as a partial statement of natural law, it does not follow that a community violates that law by failing to make blasphemy a misdemeanor and sentencing the blasphemer to $10 or ten days.[11] The natural law sets the standards in a general way for the kinds of positive laws that should be enacted: it provides guidance; it does not prescribe a particular statute or judicial decision. One should be able to argue back from a legislative, judicial, or administrative decision to natural law. One cannot start with it and "deduce" the result.

The attack on natural law has to be an attack on the proposition that man has a nature, or one that is sufficiently stable and ascertainable to throw any light on the question of what men should do. The usual criticisms, that natural law rests on theology, that it is inflexible, that it embodies contingent historical norms, that it does not take into account new conditions, the new knowledge of man, the new linguistic philosophy, or the new physics, are either untrue or irrelevant. But if there is no such thing as the nature of man, or if we cannot say what it is, then there can be no such thing as natural law.

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[10] As Justice Frankfurter apparently does. *Rochin v. California,* 342 U. S. 165 (1952). And as Roscoe Pound appears to do in his lecture *A World Legal Order: Law and Laws in Relation to World Law,* published by the Fletcher School of Law and Diplomacy, Tufts University, 1959.

[11] David Spitz, *Democracy and the Challenge of Power,* Columbia University Press, 1958, p. 125, attributes to adherents of natural law the notion that general maxims decide concrete cases.

III

It will be seen at once that this outline has moved from the question of unity to the question of standards. The most pluralistic society must have a common purpose if it is to be a political community. The common purpose gives it unity. Its purpose also gives it standards. The consensus, in any meaning of the word, holds the country together and at the same time supplies the basis for judging laws, political proposals, actions, and decisions.

Unless there is in the wisdom of the people some sharing in or comprehension of the consensus, it is difficult to see how it, in the meaning given to it by Mr. Berle or Father Murray, can hold a country together. The sharing may be meagre and the comprehension dim, partial, or even subconscious, but people can hardly be united by something that they do not in some way feel. Mr. Berle must hold that the consensus is in the people. Otherwise it is not a reflection of the unity of the people in their common purpose but the expression of the ideals of an élite. According to Berle, the ideals of the élite are contained in natural law. Father Murray, on the other hand, must take the view that the principles of the natural law are in us all. They at once unite us and provide the criteria of political action.

The consensus in the meaning given it by Holmes and Hand denies the validity of criteria, except perhaps for some of a statistical kind. If we know who are dominant or what the majority wants, or what the mores are, we know what the decision should be. Holmes and Hand appear to take the position that there is no difference between right and wrong, justice and injustice, except as the community declares itself upon them through law and custom. The purpose of the political community must therefore be to carry out the will of the dominant group or of the majority, whatever that will may be. There is by definition no standard that can be applied to that will: one may not ask, for example, whether a given act of the legislature is wise.

We know from the extra-judicial statements of Holmes and Hand that it is not the federal principle or the separation of powers

that makes the issues mentioned not susceptible of decision by the courts; it is the impossibility of reaching any rationally defensible conclusions, judicially or non-judicially, about them. Any such view, of course, applies with equal force to legislatures, Presidents, and individuals. If Holmes and Hand were asked why it did not apply also to the dominant group, or to the majority, or to the people as a whole, they would have to reply that things must be decided and that, though the people as a whole do not know justice from injustice or wisdom from folly, it is after all their government—and their funeral. The consensus to these judges could be nothing more than the consent to live under such a government and have things run this way.

IV

It has been suggested above that the minimum common purpose of a political community must be that of living under the law. This is minimal indeed if the law is nothing more than the will of the dominant group or of the majority or if it is simply a reflection of the mores. But if, to use the classical formula, law is an ordinance of reason directed to the common good, then a commitment to live together under law carries with it a commitment to reason and the common good. Such a commitment involves some degree of dedication to peace, order, freedom, and justice.

The jurisprudence of Austin, as it has been applied throughout Anglo-American law since the late nineteenth century, involves no such commitment. Law is said to be the command of the sovereign. In the United States this was made into the doctrine that the law was what the courts would do. The law is an application of power, an instrument of coercion. The principal, if not the only, question that may be asked about any law or in any case is whether the proper procedures were followed. It is obviously impossible to raise questions of freedom and justice if the sole duty of the court is to decide whether the case at bar falls within the scope of the duly issued command of a duly constituted sovereign.

Where law is regarded as the command of the sovereign and hence, in democratic countries, the application of the power of the majority to the coerced minority, it follows that right-thinking men, who are concerned about individual freedom in general and the rights of minorities in particular, should seek to limit the sphere of law. If we are to have maximum freedom, we must have minimum law. Hence the jurisprudence that purports to follow Austin leads to undue emphasis upon the first face of federalism.

Austinian jurisprudence appears to be suicidal: it puts an end to jurisprudence. There is nothing to discuss. And, in fact, jurisprudence has no important role, and in many cases no role at all, in the American law schools. Yet the proposition that there is no such thing as jurisprudence is itself a proposition in jurisprudence. And if there is any promise in the second face of federalism, some general principles of law will have to be worked out.[12]

The jurisprudential question presented by the theoretical development of the second face of federalism is whether it is possible to legislate freedom. Whereas the first face tends to look upon law as an invasion of freedom, the second could look on it as a means of establishing, extending, or confirming freedom: political liberty is liberty under law. If the political community is to allocate functions and duties, it must have legal principles to guide and measure the allocation.

The centers of private power in society are now seeking legitimacy. This is a search for law, for law that will establish the relations among members of these groups and between them and the rest of society. The decay or inapplicability of the law of property and contract lies at the bottom of the current disorder of the big corporation and the big union.[13] These groups, and other organ-

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[12] On the need for such principles as seen from another country, see an article by a Canadian scholar, Edward McWhinney, "An Exercise in Comparative Jurisprudence," 6 Journ. of Public Law, at p. 470 (1958).

[13] A recent example in contract is *Lewis v. Benedict Coal Corporation*,—U. S.—, 4 L ed 2d 442, decided Feb. 23, 1960, where Frankfurter, J., dissenting, reminds his brethren that they are likely to be "much more surefooted" in applying principles of contract than they are "in discerning the needs of wise industrial relations."

izations, too, are looking for a recognized and sanctioned place, a role, or a function that rests on something more than the power they have been able to acquire. But if law is simply power, then it has no higher standing than any other; and if politics is deals, the power, or law, that comes out of it is as disreputable as it is unjustifiable. In the absence of legal principle, it is difficult to see how law can confer legitimacy.

Laws, good or bad, are teachers. Yves Simon has called attention to "the unequaled pedagogical force constituted by the machinery of positive law." He says, using the example of laws against child labor, that this machinery is the only means by which newly worked out moral truths can prevail against habit and prejudice. But he assumes that the law will reflect moral truth, which seems to demand a jurisprudence different from that prevailing today.

The classical, medieval, pre-Austinian formulation of the principles of law was of course developed before technology had reduced the world to small proportions and changed all the other conditions of our lives. It may be that this ancient doctrine has no message for the global, technical society that we are living in. But it seems unlikely that the call for the Rule of Law or World Law can be answered by contemporary jurisprudence either. If law is simply the expression of the power of the ruling group, or of the majority, then it would seem wiser to stay at home and suffer under the power you know than to risk subjection to that of foreigners. It will not be reassuring to minorities to be told that World Law is what the World Court will do. As Roscoe Pound has said,[14] "The effectiveness of the legal order and of law as its organ is impaired by thinking of it solely as a regime of forcible repression. This is especially true if we essay to set up a law of the world. If for 'undesirable conduct' we substitute 'socially undesired conduct,' we risk implication of conduct not desired as a matter of arbitrary will of the lawmaker."

The limitations of contemporary jurisprudence in confronting the problems of world organization and world law have also been pointed out by an Indonesian observer, S. Takdir Alisjahbana. He

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[14] *Op. cit.*, p. 13.

says, "We are so used to identifying democracy with negative freedom that any kind of intervention in the life of the citizen or the nation is considered as an act of dictatorship. Democracy becomes an empty form because every content which would give a certain direction, even in the direction of democracy itself, intervenes in the freedom of the individual or the nation. This is the failure of our democratic thinkers in the past as well as at present, and especially the failure of our democratic leaders after the second world war to see and utilize the possibilities of world organization."

Anglo-American jurisprudence reflects the technical characteristics of the world in which we live. The success of Austin's system was guaranteed when it was hailed in England as "scientific." Law is looked upon as the application of power to society: it makes the wheels go round. The present atmosphere reinforces the technical tradition of bench and bar in England and America, where the development of the law has been in the hands of craftsmen who did not ask themselves questions of principle, but only how do I do what needs to be done, in court or in the office, on behalf of the interests I represent? The transfer of legal education in the United States from the law office to the universities was largely geographical: the training remained the same; only the place was different. The law schools have seldom been much affected by the universities of which they are nominally a part.

We now have a tendency to say that most government is administration and that administration is technical. Since the thing to do is to get on with the business in the most efficient way, we should aim at the right procedure, rather than the right result. It is no accident that on both sides of the Atlantic the feeling is growing that a new jurisprudence supplying legal principles to guide the bureaucracy must be developed. The standard of efficiency has alienated the people from the bureaucracy, but no other is readily available. At present nobody knows whether administrative law is administration or law.[15]

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[15] For a recent example, see *Schilling v. Rogers,*—U. S.—, 4 L ed 2d 1478, decided June 20, 1960, where the Supreme Court divided 5-4 on whether the Trading with the Enemy Act precluded judicial review and whether the issue concerned was a matter of administrative discretion or a question of law.

The conflict between human beings and the technical tendencies of society is obvious enough. Yves Simon has said, "The new rationalism born of the rationality of our technical environment may be the least reconcilable enemy of democracy and more generally of liberty. . . . The rationalism born of technological pride hates human liberty both on account of its excellence and on account of its wretchedness."

Here the two faces of federalism appear as one. Whether we aim at individual freedom or at liberty under law, we cannot accept the rationalism of technology. Individual freedom is associated with doubt, hesitancy, perplexity, trial and error. These technology cannot countenance. Liberty under law presupposes the supremacy of politics. It presupposes the possibility, for example, that political deliberation might lead to the decision to postpone the introduction of a new machine. Technology, on the other hand, asserts that what we can do is worth doing; the things most worth doing are those we can do most efficiently; or, in de Jouvenel's phrase, we should not do what is good for us, but what we are good at.

When the question is what can be done about technology, it seems likely that the notion of individual freedom based on the limitation of the sphere of government and law will have little to offer, either in guiding technology or in regulating its effects. If any guidance is to be forthcoming, it will have to come from the political community. Regulation of effects must come from the same source.

When proposals for a four-day week in steel and a six-month year for pressmen can be seriously discussed, and when the prospects in other industries are the same, we can hardly hope that mechanisms associated with "free enterprise" or "freedom of contract" or minimal government will be effective in re-locating, re-training, and re-orienting millions of workers who will more or less suddenly find that they are living in a new world. This will almost certainly be a world without work as that word has been understood since Adam and Eve left Paradise.

On the other hand, political liberty, liberty under law, has little commendable to offer if the law is nothing but the expression of

the power of the state. That power may indeed be exerted to control men and machines, but, if politics is deals and law is what courts will do, the exercise of the power cannot produce or result from political liberty. If government is a machine, or is thought of as one, either by the governors or the governed, an appeal to government to preserve us from the machine must appear absurd.

The technical syndrome goes very deep. The citizen sees that there are techniques of getting things done in politics, of getting laws passed. If there is reason in the law, the citizen does not notice it. He knows that law is a fabrication of politics, which he thinks of as a struggle among pressure groups. If the law that results is inconvenient for him, he regards it as an imposition upon him. Whether or not men can be manipulated, most men believe that attempts are being made, through law and politics, to manipulate them. After all, there are techniques of manipulating everything else, and the advertising business has achieved enough success to give ground for supposing that it may be able, as well as willing, to widen its field indefinitely. We are all built into the technical system, as cogs in the machine and as an automatic claque. The more incomprehensible the achievements of technology become, the more enthusiasm they arouse. Yet it appears that they may endanger freedom, justice, law, democracy, and even capitalism itself.[16]

The commitment to the highest possible rate of technological change is almost in the nature of the case "anti-law." Law is general and pedagogical; it states rules of conduct thought to be desirable under circumstances thought likely to continue long enough to make the statement worthwhile. It presupposes a certain stability. Political or legal control of technology must therefore result in the regulation of the rate of technological changes. Those which were thought to have dubious effects upon the political community would be delayed until they could be examined.

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[16] Where technicians are in charge, they may insist on the purchase of new machines before the ones in use can be amortized. Machines may become so expensive that only the state can afford them.

Some might be indefinitely postponed, or prohibited. Others, discovered to be beneficial, might be accelerated.

Technology holds out the hope that men can actually achieve at last goals toward which they have been struggling since the dawn of history: freedom from want, disease, and drudgery, and the consequent opportunity to lead human lives. But a rich, healthy, workless world peopled by bio-mechanical links is an inhuman world. The prospects of humanity turn upon its ability to find the law that will direct technology to human uses.

A DISCUSSION

The participants in
this Discussion included:

Harrison Brown
Scott Buchanan
Eugene Burdick
William O. Douglas
Eric F. Goldman
John Courtney Murray, S.J.
Reinhold Niebuhr
I. I. Rabi

Consultants to the Center

Harry S. Ashmore
John Cogley
W. H. Ferry
William Gorman
Hallock Hoffman
Robert M. Hutchins
Frank K. Kelly
William Lee Miller
Walter Millis
Carl F. Stover

of the Center

Two Faces

HUTCHINS: "Two Faces of Federalism" is an attempt to list the subjects that we have been discussing at the Center for the past several months. I suppose the question is whether the arguments are fairly presented. What can be added to them? What do you think of them? How can they be qualified? The object of the exercise, as I need not remind you, is to clarify the issues. The effort is to try to figure out what the standards are. It is a question that Father Murray asked even before we were formally organized. Learned Hand, for example, would simply say that this is a question we don't ask. We are here, this is our form of government, and the majority will determine what we ought to do. And if you ask how we are held together—well, we are held together by geography, by language, by history and tradition, and by our adherence, which we have developed simply from living with them so many years, to the laws and the Constitution of our country. This view seems to me to be open to very serious question. Your views are solicited.

MURRAY: I understand you to be saying, Mr. Chairman, that these two faces of federalism come out of history; that is, they have an empirical origin. They are not categories that you dreamed up.

HUTCHINS: I hope not.

MURRAY: I understand, too, that for the purpose of the paper you sharpened, quite rightly, the difference between them. Would you maintain that these two faces, although visible as orientations in history, are necessarily irreducible, or would it be necessary to

say that the difficulties you feel with both is that they are perhaps too unilateral—that neither orientation has taken proper account of the values proper to the other?

HUTCHINS: Yes, I should think that is true. It is not intended here to condemn either orientation. I would certainly not wish to condemn individual freedom, and I certainly would not wish to condemn liberty under law. The question is: Where does the emphasis have to lie now? It is not said that you will find these two positions pure and undiluted. These are two emphases that it is possible to distinguish. You can go on from there to consider the consequences resulting from one emphasis or the other. You might then decide that what you wanted was some combination in some balance. If that is what you want, I would like to try to find out during these discussions why that would be worthwhile and where the emphasis would lie.

I can't, of course, accept at all the notion that I am indulging in Utopian dreaming, or thinking up a society that does not exist. This is an attempt to state not merely what has come out of our arguments but what has been implied in our arguments when we have discussed the current world.

NIEBUHR: The very form of your argument prevents the statement that either one can be excluded. It seems to me that that is a significant part of our political situation, not only in America but in the rest of the world: you can't absolutely exclude any of the alternatives open to a society. Empirically we have excluded some. We have excluded *laissez faire*. The advocates of absolute planning move on the presupposition that *laissez faire* has been excluded and also that technology has given greater weight to the second face. Federalism is probably not the word for maximal government, because in federalism one always thinks of the state governments. But you are thinking of the whole structure of government in relation to society.

HUTCHINS: Right.

NIEBUHR: And you say two things. One is that these are irreducible alternatives. As a generalization it is true that in the whole Western history they haven't been resolved, and I don't think they can be resolved. That is why we have elections. Perhaps you ought to emphasize the fact that the empirical evidence has given such

weight to the second alternative that it has excluded not only the *laissez faire* alternative but also some moderate forms of it. You have the Tory Party taking over some of the Labor Party reforms, and you have the Republicans taking over the Democratic Party's platform. That is significant.

HUTCHINS: I am sure you can find many statements in the remarks made at the Republican convention that would allow you to assume that the first face of federalism is one to which the people of this country are unanimously dedicated. President Eisenhower's speech emphasized nothing but protection against government and protection against arbitrary power of one kind or another. The people, in being protected from government, operate for themselves without any further interest on the part of the government in what is in this paper called achievement. This is an extreme view and has been indicated as an unrealizable position even for the Republicans themselves.

BUCHANAN: Shouldn't we try to rescue this from political conventions, from the idea that these are debating positions, and see if we can't understand what federalism itself means? As I understand federalism, it is a theory of our government, and there are these two sides of it that have been thought about. They did not become separate theories of federalism. They are two aspects which must be put together: Does a certain amount of federalism demand a certain amount of unity, or, put another way, does a certain amount of unity imply some degree of pluralism in it? I think that is the issue.

HUTCHINS: That is right. I think no rational person would want to consider a society in which there was no protection. On the other hand, no rational person would want to consider a society in which all the achievement was on the part of individuals, with the government exonerated from any responsibility in this regard.

MURRAY: As I read the paper, it seems to me that you could transpose the two orientations onto a more political level, and perhaps the poles of discussion you would reach would be these: In the first face of federalism government and law are conceived as a power; in the second they are conceived as authority. Power as such in its naked concept can only be limited from the outside, whereas authority, again in its proper concept, is self-limiting. It operates under a charter. In the second face limited government

is limited to certain means and ends, and limited to these by its very nature and not because somebody else prevents it from pursuing other ends. Would it help if you would say precisely why you use the word federalism?

HUTCHINS: Genetically I used it because it is a word we have kicked around here. Also, I used it because it seemed to me that in our consideration of our federal form of government both of these strains have been present. It seemed to me useful to indicate that although when we talk of federalism we think of the fractionization of the body politic it is possible to talk of it without thinking of fractionization in the same way. We think of the federal government as a government with a central government and with state governments, and of federalism as a relationship between these two, and we always assume that these are centers of power and are to some extent autonomous. It seemed to me useful to suggest that you could have a federal government in which this was not the case to nearly the same extent. It is a system of limited government by which you had, according to the Constitution and the laws, the allocation of responsibilities within the body politic.

DOUGLAS: Isn't there something inherently self-limiting in face number one of federalism? It depends upon what you put in there to limit the powers of government, what the list is.

HUTCHINS: If you make a list of a certain kind, you find that you have a second face.

DOUGLAS: That is right, but then you get into a very deep and important basic distinction. Are you going to specify the limitations so that everybody knows what they are? They are debated and they are argued; for example, about the right to work, about the right to medical care. Are you going to specify them; are you all going to agree upon the necessary limitations; or are you going to leave it to the visceral reactions of judges and what not to determine what can or cannot be done? If you want to particularize face number one, you can then have more certain guides. You won't be subject to the caprice of people who are sitting in judgment and saying, "Well, this is my natural law," and away we go.

MURRAY: I would not concede, however, that in pursuing and moving along the line of face number two you would necessarily be falling captive to a caprice. If you are going to proceed along

face number two, you would have to have some set of standards or guarantees to put you on the right path and to rescue you from your captivity by hunches, judicial hunches, legislative impulses, or what not—something to keep you from acting, whether in the court or in the legislature, in some arbitrary fashion. And this is not easy.

DOUGLAS: Then you end up with a free-wheeling society, with five out of nine judges deciding ultimately what is fair, as drawn from their experiences and backgrounds by mere accident. Are you going to leave these questions for *ad hoc* determinations by groups gratuitously assembled, to judges chosen by standards that have no relevancy to their responsibilities? That is what you get into with face number two.

MURRAY: But don't you have to put the problem one step farther back—that somehow or other the laws of society and also the decisions of society's courts must reflect some sort of growing social consensus? You might, for instance, some fine day get a consensus in this country that every man must have a job. But nowadays some people maintain that full employment is inflationary. This argument would have to be worked out somehow. If you did get to the point where such a social consensus was established, leaving aside for later argument how it gets established, then I suppose the thing would happen.

DOUGLAS: It is happening—when the government in its loyalty program went down all the lists of contractors with the federal government and deprived people of the right to work, making them outcasts because they read the *New Republic.*

MURRAY: Whether the standards or ideas behind this program of governmental action represent simply opinion, as I would call it, or consensus, it raises the issue that maybe some day it will be recognized that this type of governmental, legal, and also private action is wrong. We shouldn't do this sort of thing. A man ought to be allowed to read the *New Republic* and have a job as well.

DOUGLAS: Are you going to act from the Constitution or act from our history? There was the trial of William Penn in England. The jury acquitted him, and the judge put the jury in jail. Well, that burned into the minds of the people of Jefferson's generation that jury trial was something we had to stick to. That wasn't the start

of it, but that trial was the clincher on jury trials. In the light of current experiences are you going to say there are other things that are going to be put in here, other basic guarantees that government shall not burn the brand on the forehead of Murray, or anybody else?

If you really want to be analytical, there are three faces, your first and second, and the third is a free-wheeling jurisprudence which qualifies every one of the specific guarantees depending upon the visceral reactions of the judges. The Constitution says that there shall be freedom of speech and no law abridging freedom of speech. The judges sit and say yes, but there can be some laws, and what they are depends upon their conception of the Constitution, their conception of natural law, their conception of what is needed for the society and the individual. So you are living under a regime that is a combination of faces one and two.

HUTCHINS: If you could be satisfied that you had a political order which was operating in some comprehensible and defensible way and that there were legal principles other than those that were put into our minds when we were at law school, or at our mother's knee, would you regard the second face of federalism as so alarming? Do you believe that it is impossible even to conceive in the United States at any time in the future of a political order that would operate in a way satisfactory to you, or that there might be developed any principles of jurisprudence sufficient to restrain some of the judges from the application of their visceral reactions?

DOUGLAS: I think that the society we live in needs continuous education. That is why I have been so proud of what you have been doing here. I think we are living under a combination of the faces, but mostly face number two. I would think it a healthier influence over a long period of years if in this generation we could hammer out other things to add to what we already have of limitations on government, or guarantees to the individual, and fix them as standards rather than leave them to the accident of the moment, or to those who will be in power.

HUTCHINS: You don't see any possibility of excluding or controlling the accident through the development of decent laws covering the political process—decent principles of jurisprudence?

DOUGLAS: You need these things in moments of tremendous pressure and excitement, and I have very little confidence in the operation of the system in those moments unless there have been carved out, written in granite, some of the things that people deem to be basic. Otherwise, the jingoists, the judges, the legislators, newspaper editors, professors, and everybody are all propelled down a highway. Maybe they will be propelled anyway. But if you had in the Constitution the guarantee of the right to work in precise terms, for example, I don't think you would have had the number of tragedies in private enterprise among government contractors, where just thousands of people were dismissed because of their slightly radical, leftist views, or because their wife wears overalls, or because she sleeps on a board, or is otherwise somewhat eccentric. These are actual cases. This is part of the tragedy of the period we have been through.

MILLIS: Under the second face and the principle of expediency, don't you get about as strong a protection as you would have by strengthening the first face?

HUTCHINS: I think the answer to that must be that the power is admitted under the second face, and the power, therefore, may be exercised. The Justice is saying that there should be constitutional statements that would, under all circumstances, it is hoped, prevent the exercise of this power.

MILLIS: Yes. The exercise of power has been regulated better, restrained better, in Britain, although theoretically power is admitted in Parliament to be absolute and supreme.

DOUGLAS: In England they will arrest the man who heckles a speaker. Here in America they will arrest the speaker for making somebody heckle.

MURRAY: In other words, the problem that you have identified, Mr. Justice, is not in the first instance a legal problem.

DOUGLAS: Yes, it is. You should read all the decisions in the last twenty years dealing with what the states, as distinguished from the federal government, can do to the individual, because the Bill of Rights applies to the states through the operation of the due process clause of the Fourteenth Amendment. So we get the question of what is due process. Is it freedom of speech as in the First Amendment? No, says the court, it is not the right to speak;

it is a watered-down version of the right to speak. Is it free press in the sense of the First Amendment? No, it is a watered-down version of freedom of the press. It is the kind of freedom of speech and of press and of assembly that fits the judges' conception of ordered liberty. Take the Fifth Amendment and torture: How long can you hold a man? Under federal law you can't hold him at all. Under state law is five days too much? Can they burn his feet with live cigars? Well, maybe they can do it for an hour or so, but not if they do it for a considerable period of time. You can look at the last twenty years of decisions by the Supreme Court and by the state courts, and their conception of ordered liberty, and it just doesn't mean anything. It shows only the subjective reactions of people up and down the bench.

HUTCHINS: You are just approaching the point in the third part of my paper that legal education is no good—

DOUGLAS: Right.

HUTCHINS: —and that a decent tradition at the bar and a decent tradition on the bench might both be supplied eventually by education.

MURRAY: This is a broader problem than a legal one. You are quite right in saying that the problem gets dumped in front of the court. But why does it get to the point of reaching the court? Is it not because something has gone wrong further back?

DOUGLAS: Well, the FBI taps the wire and you go to prison. Does tapping wires violate natural law? Should government be allowed to do it, state, federal, or municipal? Isn't that an element of privacy which is so important to the dignity and integrity of the individual's life that government should not intrude? I personally would put that in the Constitution, I think.

HUTCHINS: Since we can't expect everything to be fine, we have to protect ourselves, and the way to protect ourselves is through the first face of federalism elaborated to take into account some of the guarantees that history shows us the citizen now requires.

DOUGLAS: Yes, with the catch-all that anything that violates due process needs to be enumerated; this would include things that government could not do to the citizen, although you can't be omniscient and think of everything.

MURRAY: I think Mr. Douglas's central point, as I understand the tenor of his remarks, is that, as you move from face number one into face number two, you had better watch your step.

HUTCHINS: It is worse than that. Even if you watch your step, it isn't going to work, so you had better stay away from it as far as possible. In addition, you have to set up additional protections, if you can.

DOUGLAS: Yes.

KELLY: You oppose the concept of ordered liberty?

DOUGLAS: No, I am for it, but I think it should not be left to the whim and caprice of judges and legislators.

HUTCHINS: The fact is that nobody knows at the present time what the concept of ordered liberty means.

DOUGLAS: 5 to 4 one way, or 4 to 5 the other.

BUCHANAN: I don't see how the second face is weaker than the first with respect to what Mr. Douglas is bringing up here. I think the second face would strengthen the first. This would be taking account of what the liberties are, and if our statutes—

DOUGLAS: The Fourteenth Amendment says every person born in the United States is a citizen. All of you who were born here have assumed until recently that your status as a citizen is something that you acquired at birth. But the court recently held that Congress can take that away from you, which to me was a very shocking thing. The court was divided, but it said the conception of due process modifies every right in the Constitution. And so you get a free-wheeling conception of natural law, or whatever you want to call it, that cuts down these specific guarantees.

HUTCHINS: I would like to say in passing that it seems to me that some of your colleagues don't know what they are doing when they talk about natural law.

Four Questions

DOUGLAS: I would like to say about federalism that I don't think it is irrelevant. I think that as you look around the world to the great land masses you are almost bound to have some kind of federal government—Russian, Indian, American, Australian—because the local problems are so far removed from the center. The center can't deal with them all, because they don't have the intelligence.

As I read this paper, I had several questions. The first question is: Is there anything government should be able to do that it can't do now? That is, irrespective of whether it is a federal or a state government. As far as laws and constitutional guarantees go, there are close parallels all the way down through, except in some states. The First Amendment says that Congress shall make no law abridging the freedom of speech. That implies that we are making some laws abridging speech. You can talk, but the Communists can't talk. You can write a paper on federalism, but you can't write and publish a paper that will rouse somebody's sexual desires. That is at one level. At the economic level I don't know of anything in the Constitution that could prevent the nation or California from becoming socialistic, if you wanted to have it that way.

My second question is: Is there anything government is presently doing that it should be stopped from doing—I mean in terms of the charter, in terms of the limitations on government?

The third question is: Where should the centers of power be? Should they be in Washington, in Sacramento, or should they be in the hands of local groups?

The fourth question is: Should any of the powers of government be transferred over to private groups? I think that is probably the milk in the cocoanut in terms of the power struggle in the years ahead. To what extent are you going to transfer the powers of government to private groups—to a labor union or to a corporation?

BROWN: Do you mean actual powers or functions?

DOUGLAS: Actual powers. In Russia, for example, the courts are trying to decide whether they should give power to the trade unions to try their members and to impose fines and imprisonment. Should we give to corporations the power to pass laws

governing what is fair and unfair competition, what the proper method of doing business is? Under the framework of the state and federal constitutions, the law-making power resides in the legislative branch.

It seems to me these questions are extremely relevant to this incisive paper, which goes to the heart of the problem that confronts us. I am speaking in terms of constitutional law, because in terms of constitutional law the court that struck down NRA would be sustained by any other court because it was contrary to the American scheme of government. The making of laws to transfer governmental power to private groups would require a constitutional amendment.

HUTCHINS: I suppose the answer to the first is—always bearing in mind Mr. Chief Justice Hughes' remark that "the Constitution is what the judges say it is"—that the government can constitutionally, if the court will permit it, do almost anything. The question is not whether the court alone will permit it, but whether our attitude toward what the government may properly do will allow the government to do it. We have, under the influence of Mr. Buchanan, been talking a lot about misonomy, which is hatred of the law.

DOUGLAS: That's what I've got.

HUTCHINS: Anybody who has ever taught it has it. This paper is intended to raise the question whether the popular view of the law and of the government is such as to permit the government to do the things it ought to do.

DOUGLAS: On the property phase, your illustration of the effect extended government power might have over private institutions is excellent. Should tax money be used to support private churches and schools and private colleges like Harvard, and other things? But you touched upon the whole area, didn't you?

HUTCHINS: Yes. And the answer is that certainly I agree that if the court and the legislature could get the kind of popular support that they ought to have to do the things that ought to be done, there is nothing in the express words of the Constitution to prevent them. Whether there is anything that the government is doing that it should be stopped from doing is a question that can't be answered, because we have no clear idea of what the government

ought to be doing. The same is true of the question of where the centers of power should be; and the same is true of the question of whether any of the powers of government should be turned over to private groups.

Is it possible to take a view of society and of government that would enable you to answer these questions in some sensible way, or do you have to cope with each of them *ad hoc,* which is the way our present system has grown up? The suggestion in the paper is that we have got to the point where we can't cope with these problems *ad hoc.* You have to know something about the political purposes of your society. If we can find out the answers to any of these questions, or even get some suggestions as to how these questions might be studied, or how they might be attacked—

MURRAY: I would put the formulation this way: Is there anything that government presently ought to be doing or ought to be stopped from doing that it is presently doing? As I understood your paper, in the word "ought," you have to adduce a reason. The reason might be sheer efficiency, as indicated in the last part of your paper, namely, government would be turned into sheer administration. There are those who say that is the native tendency, that the ambition of all politicians is to turn all political decisions into administrative decisions. But you would have to adduce a case, a reason for stopping government, for requiring that it act in this or that way. Is that the essential thread of your paper? Then it becomes a problem in political theory and legal theory too. Would you not say that is the limit that you posit? There would be no politics, only administration. There would have to be administration, but no politics.

BROWN: Wouldn't there be a tremendous amount of politics involving the rules and regulations, involving who gets how much of what?

MURRAY: That is what I call administration, not politics.

NIEBUHR: If you recognize that technology will on the whole decrease the power of labor against management, then there would be a tremendous political power for government, because government has allowed technology to grow up for the sake of justice and now it would have to intervene more than it does now for the sake of justice.

DOUGLAS: That is not completely true, because labor has the arbitration system now, and that is a system of law within the collective bargaining agreement.

NIEBUHR: The labor people argue that the public interest must be defended by government before it is defended by arbitration. This would mean more government.

DOUGLAS: That is a different level of discourse. I was talking about an arbitration within the collective bargaining system.

HUTCHINS: What about Justice Douglas's first two questions, which can be stated as: What should government do, or what should government not do, and how do you tell? That is the central issue of this paper.

MURRAY: We have got to know what government is and what the scope of government is; what it excludes and what it includes. These are the problems.

RABI: When you say what government should do, do you mean what new powers should government acquire?

HUTCHINS: As the Justice says, it has got all the power it needs.

RABI: I just want to understand the question when you ask what government should do. Do you mean it should increase or decrease taxes, or things of that sort?

ASHMORE: It would also include what government should not do.

HUTCHINS: Let us try to make it neutral: What is the government to do in the emerging society?

MILLIS: The question is: Which of the powers it has should it exercise?

FERRY: Should it set standards of performance for universities or industry? The lack of criteria in national life was remarked by all of the people who contributed to Mr. Luce's big colloquy in *Life* magazine on the national purpose. Where are the criteria to come from? If Justice Douglas is right, this is the power the government has the right to use.

MURRAY: Would you say, Mr. Chairman, that the first approach or face of federalism, as a theory and as stated, is presently so obsolete that we needn't much bother with it? This reserves the question as to whether there might be an essential element of truth or value in it, but to attempt to base an industrial technological society on it is simply silly. You just could not do it. It may be true, as you said before, that this is the kind of talk you hear, as if this is the sort of thing we wanted. You even hear nowadays that thing about that government is best which governs least. This is ritual incantation. This is simply ridiculous today.

DOUGLAS: That depends upon what you are talking about. If you are talking about the relation of government to churches, you wouldn't be talking that way, would you?

MURRAY: That would be reserving the element of truth in it. There may be an aspect of truth in this theory which should direct government in certain fields, such as culture or religion.

DOUGLAS: The first face certainly has extreme validity in certain areas. On the economic side it doesn't make much sense, but in terms of church and state it has much validity.

MURRAY: But as a total theory of government it is inoperative. It needs therefore to be completed.

DOUGLAS: It was never designed as a total theory of government. It was a selection of things that government couldn't do. One had to do with the church; one was speech; one was assembly, and so on.

HUTCHINS: There are many decisions of the honorable court of which you are a member that have gone the other way.

DOUGLAS: On the economic side, yes.

HUTCHINS: On the economic side. So there have been periods in our history in which this was not only the way we talked but also the way we acted.

MURRAY: What I had in mind to launch as a course of argument is this: You might find out what the role of government is by an analysis and criticism of the approaches described in this paper, leaving aside for the moment whether there are other approaches. The first one that has come out is that an essential function or role

of government is the protection of the political order antecedent to itself – such rights as the preferred freedoms, the freedom of religion, and all that sort of thing. That is one valid role of government. Today we cannot be content with the bald statement that this alone is the role of government. There must be other roles for government. But we have identified one area in which government is incompetent, in which it has no power, and this is partly responsive to your question of what government should not do. We can say certain things it should not do on the basis of this first face of federalism. But when you have said this, you have not said nearly enough to constitute an adequate and complete theory.

ASHMORE: Isn't that the nature of the problem? If you shift away from the first face and concentrate on the second face, how do you preserve the immunities, the individual liberties, inherent in the first face? At what point do you begin to cut away those individual liberties as you move to the second face?

MURRAY: That is true. Having made your first affirmation that there is an area of immunity from governmental power and interference, then you look at the second face and ask a series of questions having to do with government as concerned with achievement. Then, when you have specified the kinds of achievement that you want from government, you had better take another look and see whether in the course of achieving these things it doesn't shatter the prior part of your theory.

COGLEY: I am wondering if we can get flat answers to the four questions propounded by Mr. Justice Douglas.

DOUGLAS: I don't know under the first question of anything that government cannot do that I would like to see it doing; that is not to say that I think it would be nice to have government do everything that it could do. Under number two I would think that we need to take a pretty thorough look at the forces that are closing in on us here in this country in terms of the power of government. It is shocking to me that the government can tap wires. I think we need some kinds of new guarantees against the powerful police atmosphere in which we live. The appropriation of the FBI is over twice the annual appropriation of the entire federal court system. That is just a straw in the wind, a reflection of the things that are

happening to people who are unpopular. None of this is new to you. It has all been uncovered in your previous reports.

I think there has to be a great strengthening of opportunities for individual activity. Otherwise, we will produce no eccentrics. I do not know of any salvation for society except through eccentrics, misfits, dissenters, people who protest. Otherwise, you don't get the spark; you just become dressed in gray and walk to the same measured beat. This is all probably academic, because I think the mood of the country is to take away some of the protections that we have rather than to give us more. I think the battle of the future is going to be around question number four: How many powers of government can General Electric get; how many powers of government can Westinghouse get; how many powers of government can the steel workers get? I think that is going to be the big battlefield.

ASHMORE: Do you approve or disapprove in principle of the transfer of these powers of government to private groups?

DOUGLAS: I would disapprove of them, because you never can get rid of your private groups.

FERRY: Where is the power of government to go then?

DOUGLAS: It should stay in the hands of people whom you can throw out of the government. I wouldn't give such terrible and vast powers to private groups.

BUCHANAN: Even if this involved getting rid of the rascals inside those groups?

DOUGLAS: Well, the rascals come and go.

BUCHANAN: If you can't get rid of them—

DOUGLAS: But your own power is over the government, the power to run them out of office.

BUCHANAN: If you give a corporation and a labor union powers of government, presumably you would want to give them powers of election and that kind of thing too.

DOUGLAS: Well, I was thinking in terms of the powers that are sometimes used *sub rosa* by the companies, providing means to up prices, for example.

BUCHANAN: You are talking about managerial or administrative authority, but if you actually take the word government seriously you might want to decentralize, as we say. You might want these groups to be quasi-governmental institutions with a republican form of government.

DOUGLAS: Where would your controls over them be?

BUCHANAN: In the same place they are now.

HUTCHINS: Are you talking about General Motors as a political organization subject to control by the political, the central, government, and also having a constitution of its own providing for political activity within General Motors?

BUCHANAN: Yes.

HUTCHINS: Mr. Buchanan is not tinkering. He is revolutionizing the economic system.

MURRAY: I have never been quite clear about this question four: Should any of the powers of government be transferred over to private groups? I am not sure of the premise.

DOUGLAS: The NRA would be a concrete example.

MURRAY: The government does not have the power. That was struck down.

DOUGLAS: We are talking about constitutional amendments.

MURRAY: In other words, there are no powers that government presently has that it might transfer without constitutional amendments?

STOVER: This is a delicate question. When the government lets a contract to a private corporation to make policy studies and recommendations, government's policy planning function may transfer to a private group.

DOUGLAS: That is just getting into advisory opinions. It isn't the power to make the decisions.

STOVER: If you ask one corporation to propose a policy plan, and you don't ask anybody else to propose an alternative, you may have to follow the recommendations the one corporation gives you. By limiting yourself to one alternative, you have to some extent given them the power to decide.

RABI: As Justice Douglas suggests, you can throw the rascals out. You can cut off the contract. It is a different thing from giving them the actual power.

STOVER: But you can get yourself into a position with a particular corporation where you cannot throw it out because you need to preserve it as a resource.

MURRAY: If you could count on the existence of other groups in society, and indeed there are such, and you consider their judgments as well as those of the one corporation that you engaged to do a policy plan, then I suppose everyone would be a little bit happier. But, still, it is awfully hard to stop—and in many ways people don't want to stop—accepting the inspiration of some of these committees, the Draper committee and the one that did the report on atomic energy. This is par for the course nowadays. Government has no time to think. Obviously, Congress, if it has time to think, can't, and so on. You have got to get these outside committees.

Society and the State

HUTCHINS: I would like to return to your statement, Father Murray, that the first thing we had to have when we were asking questions about what the role of government was to be in the society that we seemed to be about to live in was the protection of a juridical order antecedent to itself. The same sort of statement is made early in my paper: ". . . the role of the state is to 'secure,' that is, to defend and not to interfere with those basic rights which existed before the state and any other rights that the individual acquires later."

RABI: Could you explain in what sense they existed before the state?

MURRAY: In the sense that their origin is not in the organized political community itself. I would say it is in the nature of man.

DOUGLAS: When you go around the world you get different standards of what is right and just. The use of torture was accepted in Asia, and here it is outlawed. Why? People have the same spiritual content, I would assume, in Asia as they have here.

MURRAY: Well, that is a question of what people call the "emergent natural law," the fact that intelligence has to reach a certain level and stage of evolution before these truths are recognized. Torture was a judicial instrument in the West for many years up through the whole Elizabethan period in England and later. The same way with slavery. It takes a while before the intelligence and the moral conscience reach a stage of evolution in which they see that these things are wrong and are violations of the dignity of man.

Slavery in ancient Greece, for instance, was to the Greeks obviously right, because it was absolutely necessary for the economy. Brigandage among the Teutonic tribes seemed to them to be another way of making a living. It was purely economic. Highway robbery was an economic occupation, as it were, and it was not touched, at least not very firmly, by customary law.

RABI: You said something about its being in the nature of man. You took it outside the social environment and actually put it in the nature of man, and then you used the word evolution in the same sense. I don't understand how you ascertain that it is in the nature of man when it clearly isn't in the sense that different men in different places don't have it.

MURRAY: Not everything about the nature of man is necessarily evident to everybody. It takes a while before the requirements of human dignity, especially in detail, are perceived.

HUTCHINS: The question is simply whether the state confers these rights upon the citizen, or are they in some way inherent in the mere fact that the citizen is a man and he comes into the state with these rights, rather than having them conferred on him by the state? Father Murray's position certainly includes the proposition that there is a valid and deep distinction between the political order and the order of personal life, the order of social life apart from the political order. Mr. Buchanan, you have expressed yourself in our previous meetings. Do you want to express yourself now?

BUCHANAN: Yes. I happened last night to reread a speech you made, Father Murray.

MURRAY: How well you employ your time, Mr. Buchanan.

BUCHANAN: You make a point about the existence of two orders, the political and the ecclesiastical. Let us take the case of church and state. You say that the church brought into our political tradition a separation between society and the state and that, although this was at first an ecclesiastical point, it got generalized. But I would like to go back to the church position on this. For instance, I take it that in our society as we have it at present, with the Bill of Rights, the First Amendment, and so on, the church exists as an institution in this society. It has dimensions and transcendent purposes which are above society, but it belongs to it in some very genuine way, and this would be recognized by both church and state in the common law. That is, the ordinary rules of property and contract, torts and crime, would be applicable to the church as an institution and to its members. Now, what happens to the First Amendment when this is recognized as a fact? This means that the church is under the political order and the common law as a very special case. The First Amendment states that Congress shall make no law abridging freedom of religion, but you have already, by implication, a regime of common law under which the church as an institution lives and gets its temporal life. Does this disturb your thesis at all?

MURRAY: Do you mean that the dualism of society somehow cancels out the First Amendment? I don't get your point, frankly.

BUCHANAN: You have two regimes here—the ecclesiastical and the political . . .

MURRAY: And you have men as members of two societies?

BUCHANAN: Yes, that is one implication, but there is another. Inside the political field there are laws that apply to the church and, vice versa, there are laws in the ecclesiastical order that somehow are superior to and yet apply to the political order. What I am concerned about is what the separation means in cases where the implications are pretty strong. It seems to me they must be in common law. The state is incompetent to judge the purposes of a church.

MURRAY: It can produce no warrant.

DOUGLAS: A better example would be the laws exempting church property from taxation.

BUCHANAN: That is another feature. That comes in under the statutory law.

MURRAY: But you could not necessarily maintain that such an exception is inherent in the concept that governs the church's relation to the temporal law, the so-called freedom of the church. This, I think, has something of the air of a gracious concession on the part of society, not exactly as a *quid pro quo* but as if the services of the church to the society in the spiritual order are somehow compensated for by relaxing a burden of taxation. In other words, it would be very hard to prove necessarily that there would be injustice, except perhaps in some historical sense, if some other arrangement were made.

BUCHANAN: But there is implied here a competence in the state to recognize this purpose, and not to do anything about regulating it. There must be that much competence in the state in order to maintain the separation.

MURRAY: The competence takes itself from the fact that the church does occupy space in this world. Property is a thing of this world and is subject, therefore, to the secular power in its regulation of power, its transmission, its use, and so on. These things fall under the competence of the government.

BUCHANAN: But there is a judgment as to whether the purpose of the church is something the state wants to respect and deal with in certain ways. Isn't this a judgment that the state makes? It makes this judgment within its own competence, doesn't it?

MURRAY: Right.

BUCHANAN: Then what does it mean to say that the state has no competence in relation to a religious institution?

DOUGLAS: When the state passes a judgment upon the affairs of the church, it applies the laws of the church.

HUTCHINS: Suppose it is really a bowling alley.

DOUGLAS: The state reserves that right. Someone has to determine whether it is a church.

HUTCHINS: In answer to the question of what the role of government ought to be, Mr. Buchanan is proposing a very much wider role for it—or it so appears until his further explication—than any

role of government in the past. This role is set forth in my paper as more or less the second face of federalism, where you have really no distinction between the society and the political community and where you have the political community in charge of all the interests of the society, though it may in its wisdom, for the sake of expediency, give greater independence to, let us say, universities and churches than they now enjoy. This is the basic point that Buchanan is making.

MURRAY: Perhaps we could return, Mr. Chairman, to what is crucial in your paper, namely, the distinction between state and society. Briefly what I have said is this: This distinction, historically, derived from the distinction between the church and the state, which was a Christian innovation unknown in the Greek city-state. Man has a transcendent destiny, and the republic is not the highest social milieu in which the total perfection to which man can aspire is to be achieved and fulfilled. Having thus been illuminated on this subject, man in his forms of political organization then incorporated a distinction between state and society, both of which are secular magnitudes. The church is off somewhere else, so you have two dualisms, as it were. You have church and state and society, and you have society and the state. The second distinction is argued for entirely on the political level, the level of the relationship between the two being simply that they both derived from an insight into the nature of man, that just as the total life of man is not included in secular society—he transcends that—so too the total personal life of man is not involved in the organized political community, because he also as a man transcends the political community.

BUCHANAN: This is what I am worried about here. I see it perhaps too diagrammatically, but I don't see how a state can withdraw its power from any section of society.

MURRAY: This is a good point. That is the thing I should have said: The distinction between the society and the state is inadequate in the political sense and does not deny the pervasiveness of the power of law, which is the power of the state basically. The power of law can touch on, under given circumstances and for a warranted reason, any aspect of social life as such and therefore, to that extent, on many aspects of the personal life. It touches

them in different ways. It might touch them in the form of positive protection, as in the first face of federalism; but the power of law is pervasive, of that there is no doubt, because it is in charge of public order as such, and the public order is not simply the public order of the state as such. In the narrower magnitude it is the public order of society. One must, therefore, not conceive of society and state as two contiguous magnitudes on the same level, nor are they even a sort of balance of interacting things. You would be far better advised to take the medieval diagram of church and state as applying to our distinction between society and state. You have the great society, and at its interior, not set beside it but at its interior, there is the order of law of the community and the public administration, which we call the state. This dynamism is stated as an active concept. The state is the *ordering* of society, I like to say. It is not a static concept but a dynamic one, this reordering, and the power to order is everywhere pervasive.

BUCHANAN: It is co-extensive.

MURRAY: Co-extensive, but under the obligation at any moment to establish a warrant in reason for the reach of its arms into various aspects of, let us say, family life, as well as personal life. I have often thought that your difficulty—maybe I am wrong—has derived from this image of contiguity, and not enclosure. What you contend for I admit, which is the pervasive character of the power of law. I have no quarrel about this, at the same time maintaining the traditional concept of law as a limited instrument. The classic law must be enforceable. You have the principles of jurisprudence which theoretically apply to the nature of law in general, apart from any particular law.

BUCHANAN: There are transcendent features. What I can see here is a multi-dimension in which you don't want the state, for instance, telling people what to believe.

MURRAY: No, because that is the sacred order as such, and I would not grant that the state can tell the people how often they ought to go to the sacraments. This is the sacred order above the secular order, on which the distinction between society and the state exists. It is a purely secular and political distinction.

BUCHANAN: Is my diagram right? I take it we agree on the co-extensiveness of the jurisdiction of these two institutions, society

and the state. But what I see now is a third dimension above a certain level; that is, in the matter of religious belief.

MURRAY: Certainly on a reciprocal basis there are certain things that law cannot do, because law is only law. Law is a coercive instrument, and therefore, in the whole field of culture, the law is incompetent because it is incompetent necessarily by reason of its very nature. It can do no good and will always do harm when it thrusts itself and its power of coercion into areas in which the ultimate power of law has no place.

BUCHANAN: The First Amendment is not very adequate for this. When it says that Congress shall make no law regarding the establishment of religion, this is 50 per cent false. If the Congress hasn't made it, the courts have made common law that touches the establishment of religion in many respects, in fact pervasively.

DOUGLAS: They make the existence of churches possible.

BUCHANAN: Yes. They wouldn't exist as institutions if this were not true. This is a legal matter, and law must be competent in order to do this. There is no way of withdrawing its competence.

DOUGLAS: Do you think it is proper for the fire department to put out a fire in a church as well as in a department store?

BUCHANAN: Yes. The line between that kind of effect of law on the institution and any attempt of law to determine belief or sacramental procedure or teaching, this is what the First Amendment is really about, or should be about, but it doesn't say so.

HUTCHINS: The First Amendment is about the purposes of the institutions referred to.

BUCHANAN: I think it must be that, yes. I think it must have competence there in terms of your question; that is, if the church says it is a church and someone says it is a bowling alley, this is a matter for a court to decide, I take it.

MURRAY: The court has to assume the burden because the cases come up, isn't that the size of it?

DOUGLAS: Yes.

BUCHANAN: It means that the law is already implied there. That is, there are implied judgments that the court must make when the cases come up, so in that sense the law has always been there.

It isn't that the court is forced to invade something that it shouldn't invade.

HUTCHINS: I am not at this point able to say what the result would be if Father Murray or Mr. Buchanan were in charge of freedom of speech, freedom of religion, freedom of petition, freedom of assembly, freedom of the press, in the United States.

BUCHANAN: It seems to me that there is a positive reading of the First Amendment, one about which Father Murray would tend to hesitate at least; that is, the implication of the First Amendment is that government is saying to itself, "I can recognize the purposes here. They are so important that they must be fulfilled freely, and therefore it is my duty not only to protect them in the sense of not interfering by law but to make statutes or other kinds of law that will insure the independence of churches, universities, newspapers, and so on." This is the kind of government we need at present, whether we have it or not—a government that will legislate some freedoms. That is what I am saying, and I think at this point there may be disagreement.

The First Amendment and Education

MURRAY: No. I think I begin to see what you are driving at. It would be something like this, wouldn't it? If there be such things as rights antecedent to the state, and if it be true to say, as I think it is, that these rights are more than mere immunities, then it is incumbent upon the public order or public administration to give body and substance to these rights, by making sure that there is complete facility for their exercise within the society. Now, if that is your position, then you and I are certainly not in any disagreement at all.

The classic example before us at the moment—as it has been for a hundred years, of course—is the school question. The private school is immune from governmental interference in any way, but this immunity means simply that it has no right to demand anything except to be left alone. Now, you are saying in effect—or are

you?—that somehow implicit in this is that this right should be given a genuine empowerment and that this power must be expedited, and therefore a school is entitled to demand that someone do something, perhaps the government, perhaps society at large, perhaps the whole business of social organization. Something must be done so that the empowerment is real and not simply vacuous. Is that what you are saying?

BUCHANAN: Yes, and vice versa. It seems to me that the government has the right to say to the school: You have to do this. I don't mean what to teach. Well, perhaps it does involve some of that too.

MURRAY: Society acting through its instrumentality, the state, is certainly empowered to set standards of education, and anything that wants to qualify within society as a school must live up to these standards, or else the government is entitled to deny its existence. I have no trouble in theory with this.

HUTCHINS: I want to know about the standards in the practical day-by-day operation of these schools. What do the standards mean? Don't they have something to do with what goes on in the schools?

BUCHANAN: My own view would be that in order to have any kind of effect on standards, you would have to organize our education in such a way that its establishment would become responsible for all educational standards for the whole country. The university system ought to be integrated, federalized, and minimal standards set by the whole organization.

GOLDMAN: And what would the standards say? What would they talk about?

BUCHANAN: They would talk about courses, I suppose. Textbooks seem to me a little beyond the necessity right here, right away.

GOLDMAN: But textbooks are vital if you are going to determine what is going to be taught in the schools.

BUCHANAN: You have to establish some principles first. At present we have no principles about our textbooks.

GOLDMAN: We have a principle: The free play of groups—call them pressure groups, if you will—in each community shall determine what shall be taught in the schools, and this operates throughout

the country. This provides a sort of bumps and grinds freedom. Now what your principle would do is to kick upstairs to some small board of men an absolute determination of what goes on in these schools. This would be an even more tricky area with fewer guideposts than the Supreme Court has in trying matters of law.

HUTCHINS: Let me try an example that I have used a good many times. The Minister of Education in the Netherlands had the legal right to appoint all the professors in every university, and there was no restriction on his power. I asked him why he didn't try, at least why he didn't appoint one professor to the University of Leyden whom the others didn't like. He said, "My government would fall."

What he meant, I suppose, was that they were operating under the second face of federalism. They had the power, but the people and the tradition of the government meant that this power could not be exercised except in some cases of flagrant departure from the academic tradition of Holland.

GOLDMAN: The standards that are being referred to here are vague and meaningless in terms of the actual problem we are discussing. For example, they don't refer to whether it is to be this or that kind of college or to the fact that the product of one kind of college may be very different from the product of the other kind. What your program, put into effect in America, would actually require is some board arbitrarily choosing one among a number of kinds of education.

BUCHANAN: Why arbitrarily?

GOLDMAN: Because it would have to decide which is good and which is bad.

BUCHANAN: Take your learned professions and find out what they think about it. This isn't arbitrary. This is proper deliberation.

NIEBUHR: Buchanan's logic is that in the First Amendment the government recognizes the positive obligation. Murray says it recognizes its lack of competence in this field. Buchanan says all people who deal in this field are also incompetent. Goldman says you have the possibility of more totalitarian competence at the top. Doesn't the self-limitation of government mean that the government is not legally competent in the whole realm of culture

and that when you try to transfer a positive or affirmative legal responsibility to this field, because you think it is implied, you are raising a spectre of some kind of totalitarianism?

BUCHANAN: Why?

NIEBUHR: Goldman says that you say the decision would be on the basis of cultural competence, but what is cultural competence in the federal system?

BUCHANAN: Let us begin with some very simple thing. At present there are a good many schools, both private and public, that are not teaching people to read, write, and figure very well. I should say that our educational establishment ought to decide what ought to be taught to our children and what ought not to be taught. We have some necessities that are not being fulfilled at all at present, and this would be the wise thing to do.

I think most educational people would say that you are infringing on the First Amendment if you do what I am talking about, just as they would say it if we were to try it out on the newspapers. They would say, look out for the First Amendment. I think the educational community at present would howl very loudly, along with Goldman.

BURDICK: Let me give an example. In the state of California, if people want to get a teaching credential, which is given by the state, they have to take a certain number of psychology and American history courses. No one is protesting this – that the state is determining some of the curriculum content.

BUCHANAN: I think it is a matter of habit, of social habit, that no one has wanted to do this sort of thing. There is an enormous majority, as you well know, against any of the proposals I have made. People don't want to have the question resolved as to what should be taught. That sounds totalitarian to them.

ASHMORE: I don't understand. I thought the system as it actually operates in every public school and religious school requires that certain courses be taught and certain textbooks be used.

HUTCHINS: Take the University of Chicago and the State Senate investigation. The position of the University was that the state of Illinois had no right to inquire into the character or subject matter of the instruction or research conducted at the University. Now,

if it had been operated on the Buchanan principle, we would have had to argue the case on its merits and not on the basis that the state had no power.

MURRAY: Given the sprawling character of American education and the very size of it, there is probably no good way to organize it. The whole system is going to be shot through with absurdities and irrationalities. The thing we have done here in this country, as I understand it, is that there has been some social recognition of the fact that society has some sort of right to supervise education and to see that it somehow or other does a little bit more good than harm. This we have made operative, not through the classic continental way or through the use of a *Kultusministerium,* but in local terms, in terms of local organizations which have aggrandized themselves into accrediting associations, which are still of a voluntary character. They are not state authorities, although they may be in some places. This system, on the whole, give or take two or three exceptions, works fairly well. It has been interfered with, and it constantly will be interfered with, by passion and prejudice and so on. In any case, it would seem to be as a formula reasonably practical and open to improvement as well as decadence. I think that Buchanan's concept is that of a *Kultusministerium.*

BURDICK: I think what Buchanan is suggesting is that we have to break out of this kind of unconscious notion that centralization inevitably leads to arbitrariness or to totalitarianism. I don't think that we have demonstrated that it does.

Clarifying the First Amendment

BUCHANAN: May I ask the Justice a question? This is about the point he was making that face number two of federalism threatens to weaken face number one in certain respects, with respect to civil liberties. As I followed the civil liberties cases, there seemed to be difficulties about the First Amendment, because there are no clear and incisive criteria in this whole field. One of the

reasons I have been trying to develop face number two of federalism is that it seems to me we need statutory or some kind of legislative support, and the legislatures have been very derelict. The Smith Act and various other things have eaten into civil liberties pretty badly, so that their absoluteness is lost. My view is that statutes would strengthen the meaning of these absolute statements, give them implementation, set up institutions that would support them. This seems necessary to me because the cases that have come before the courts have been trivial in many cases, not substantially important. Wouldn't some enabling statutes help to clarify the meaning of the statements in the First Amendment?

DOUGLAS: Well, in the Constitution the provision of the statute has no place in the field at all, because the statute cannot qualify the Constitution.

BUCHANAN: But I thought the Constitution had a provision under which enabling statutes could be made.

DOUGLAS: In this way the First Amendment is a disabling provision.

BUCHANAN: Is that the proper interpretation of the First Amendment?

DOUGLAS: Well, that is the center of the controversy.

BUCHANAN: Shouldn't it be possible for Congress to make some laws enabling? Not abridging doesn't preclude enabling. What about newspapers, for example? Can't there be something that would enable them to do a better job than they are doing? Couldn't there be some statutes or some statements that the government could set up to enable these newspapers to do a better job?

BURDICK: Can you give an example?

DOUGLAS: I can't imagine what it would be.

BUCHANAN: Let me step out with all the totalitarians and boldly suggest that we have a ministry of information.

ASHMORE: You could do that all right, but the minute you required a newspaper to publish something that was put out by the ministry you would be abridging the First Amendment.

HUTCHINS: Let me try an example. Senator Benton proposed a presidential or statutory commission that would appraise the per-

formance of the media of mass communications and would publish periodic reports on how they were doing. This commission would therefore have to set up standards as to what is doing well and what is doing badly, and praise those that did well and condemn those that did badly. This is a kind of enablement. It doesn't go as far as the suggestion that Buchanan made. In your opinion, off the record, would you consider it unconstitutional?

DOUGLAS: I say, on the record, it is perfectly all right. There is no reason why they couldn't do that.

HUTCHINS: If you pursue this kind of line, what you would be doing is to create agencies in society that had some legal authority but were not abridgements, except as it may be thought that if you have a public body condemning a newspaper this is an abridgement of freedom of the press, which is the only way you could hold it unconstitutional.

DOUGLAS: I have heard a lot of things criticized here, but that doesn't make this Center unconstitutional.

HUTCHINS: Instead of looking, then, at the Bill of Rights as a series of prohibitions, you would ask: How can we promote freedom of religion; how can we promote freedom of speech?

DOUGLAS: I don't see any reason why not.

BUCHANAN: Wouldn't this help the Supreme Court when these cases come up, provide some guides?

DOUGLAS: We don't need guides. We need some different judges. Including me, too.

HOFFMAN: To take the most obvious example, would there be any value in saying that freedom of speech is important and it is important that people like Buchanan, as well as second- and third-class citizens, make radical speeches, and so the government, by an act of Congress, sets up a whole series of forums in which its purpose is to make sure that there is a place in every region where everybody can speak and say anything he wants to, and the object of the cops is to arrest the hecklers and not the speakers?

DOUGLAS: A great Hyde Park, in other words.

BUCHANAN: A series of Hyde Parks all the way across the country.

ASHMORE: To bring this down a little further, can you see anything in the Constitution that would prevent the government from publishing its own newspaper, or setting up a publicly owned television system and controlling the content of this system, none of which would interfere with the First Amendment?

DOUGLAS: I don't think so.

HUTCHINS: Mr. Ferry points out that the tax exemption program in this country is a method of fostering by statute a certain interest in which the country is concerned, and this is the promotion of education, of speech, of religion.

DOUGLAS: The withdrawal of tax exemption is a way of getting even with those who think the wrong things and say the wrong things.

FERRY: Suppose you went the other way. Suppose you extended tax exemption to bona fide newspapers?

ASHMORE: Wouldn't you, if you did this on any basis of discrimination whatever, raise a real question about the First Amendment?

HUTCHINS: If you don't think we have had an example in which a subsidy to those newspapers and publications that are alleged to have some cultural and educational value has been curtailed, see the *Esquire* case.

MURRAY: The other example—I don't know whether it is pertinent or not—is that there are, for instance, groups in the country who maintain that governmentally paid chaplains in the military services are somehow in violation of the *McCollum* rule, the no-aid-to-religion idea. Here is where the issue of abridgement versus enabling could come up. I am sure that this is the sort of thing that could be dealt with otherwise than through court decisions. Perhaps if this were to come up in federal court, then, *prima facie,* I would say this is an aid to religion; it certainly is. Now, you must decide if it is the kind of aid to religion as prohibited within the meaning the court wants to give to the First Amendment. Was this the sort of thing, Mr. Buchanan, that you would like qualified on the positive side?

BUCHANAN: That is right. The law has evaded the phrase in the First Amendment very thoroughly, yet it is pervasive and they say there is complete separation. I don't know why there shouldn't

be some positive invasions as well as negative invasions. Why not straighten this out by stating some positive measures that the government might take on to help us? Wouldn't it help the court if you had a few statutory guides on this, in addition to better judges?

DOUGLAS: Well, if you are talking about Hyde Parks, yes. That would be not only a help to the court but it might help the government quite a lot, I think.

HUTCHINS: These amount to declarations of public policy. That is what you are talking about, isn't it?

BUCHANAN: Yes. Let me give an example. Step into the whole area of religion and give some support for the parochial schools.

DOUGLAS: Financial support?

BUCHANAN: Yes.

DOUGLAS: You mean a declaration of legislative desire?

BUCHANAN: An enactment of it, I should think.

DOUGLAS: Well, I can't imagine any court sustaining that.

BUCHANAN: Why?

DOUGLAS: Because it would be financing religion.

BUCHANAN: It is also financing education. It happens to be connected with religion, and supposedly we want to encourage such things.

MURRAY: The issue there would be precisely yours, Buchanan, namely, a reinforcement of a freedom.

BUCHANAN: Yes.

MURRAY: Transposing an immunity to an empowerment through the only means by which that could be done, namely, by money.

DOUGLAS: One of the ways to establish religion is to finance it. This is not the only way. You can pass a law that there could be no baptisms except in the Baptist Church and no marriages except in the Methodist Church. That is one way of doing it. Another way of doing it is to finance it.

MURRAY: But you would have to make the distinction between religion as such and education with a component of religion in it.

DOUGLAS: You can't have your cake and eat it too. When they come to us in the school cases and say they are entitled to have these schools as a matter of religious instruction for the students, our court sustained them. Now, to come back and say that this is really not religious is playing fast and loose with these constitutional concepts.

ASHMORE: Did you ever have a case come up on the G.I. grants for education; that is, cases of where that money was used to pay tuition to a religious school?

DOUGLAS: No. It never reached the court.

ASHMORE: What would be your feeling about that if it did come up as a constitutional question?

HUTCHINS: It may come up, because grants are being made and payments are going to sectarian schools.

DOUGLAS: As staunchly Presbyterian as I am, and paid by the federal government as I am, I don't know what concern it is of the federal government how much I give to my church each month.

ASHMORE: As I understand the G.I. Bill, everybody who was eligible for it and who applied for it was limited by the government to use the money he received only for tuition.

COGLEY: The school got it. He didn't get it.

ASHMORE: That is right, but he made the decision as to what school he would attend, and the money could only be used for this purpose. Many of them did go, of course, to religious colleges. I suppose they even went to divinity schools.

MURRAY: They do.

ASHMORE: This came up in a great many of the discussions in the South when they were talking about the private school system. This was one of the devices they were considering, to make a head grant so that every kid could go to any school he wanted to. As far as the state was concerned, it would spread the money around. However, it was not done, so no case has come up.

DOUGLAS: That would be a pretty obvious attempt to establish a public school system under the guise of a private school label, because the life blood would be furnished from the public treasury.

HOFFMAN: What if that question came before you, not from a state that was trying to evade integration of the schools, but say from the state of California which has no problem of integration in the schools as a live issue at all. Suppose California simply said that it wanted education to be as good as possible and that the way to make it good is to make the schools compete for the students on the basis of their excellence, and the way to accomplish this is to make payments to schools in the amount of $272, or whatever the school system now receives from the state per student. The student can choose his school and the state will pay whatever school he wants to choose $272 a year. Here you don't have the issue of trying to avoid something that the federal government has said schools must do. What happens then?

DOUGLAS: It is a way of financing a religious school, and I would think it would be unconstitutional.

NIEBUHR: I think we are talking about a systematic and rather abstract question, whether the negative interpretations of the First Amendment can be logically turned into empowering and affirmative interpretations. Now, maybe it can, but we don't deal with history there at all. Certainly the political facts that made for separation of church and state were not merely positive affirmations of a transcendental realm over the political realm but simply the best way for a pluralistic society to have peace and security, and the Founding Fathers decided that to have peace and order it would be best to let the religious groups have freedom, because otherwise they would oppress each other. Buchanan's logical concept is that the negative provisions of the Constitution can be interpreted positively, and let us have either a court decision or an amendment to the Constitution.

BUCHANAN: If necessary. It seems to me it is already implied.

NIEBUHR: Yes, implied. Now, knowing the irrationality of politics, I can't imagine a whole nation saying, "By golly, this is logical, and we have got to do this." History is more dynamic.

COGLEY: I was thinking about all of the freedoms, and it seems to me that what Mr. Buchanan is calling for already exists. Consider the tax exemption given to the churches, the favorable postal rates

for the press, the special tax exemptions for public forums. Buchanan may want to give them more, but he really isn't putting forth a radical proposal. His proposal simply adds to what we already have.

BUCHANAN: Following precedent, only doing it more explicitly.

ASHMORE: Mr. Buchanan, you have talked about communications. As I understood it, you would like to find some device by which government could affirmatively propagate truth; is that a fair statement of what you are after?

BUCHANAN: Sounds like a leading question, but I follow you so far.

ASHMORE: Would you be doing this simply on a voluntary basis, making the truth available, or would you attempt to require private communications media to propagate truth? How far would you go?

BUCHANAN: I don't believe you can require truth. The truth is not that kind of thing. Propagation has some semi-associations—

ASHMORE: Strike propagation and make it dissemination.

BUCHANAN: Yes. It seems to me you ought to do all you can to make the truth available.

ASHMORE: This you would do by law, requiring that the media carry certain things that are regarded as true.

BUCHANAN: If it is the truth, yes.

HUTCHINS: It is a hell of an unconstitutional question that has been raised.

ASHMORE: I think it is.

BUCHANAN: This sounds as if some board sits up there and finds out what truth is and then dishes it out. I don't think that is what is involved. I think you have to have institutions that are concerned about the truth. We suppose that privacy does that, but actually it does the opposite rather. Private support of public things of this sort always enslaves them. We have it in all our media and in all our institutions. Wouldn't it be true to say that newspapers print whatever the traffic will bear, and that is all? The traffic doesn't bear very much truth.

ASHMORE: Under the principle of immunity they have the right to print about anything they want to that isn't libelous, including truth and untruth.

HUTCHINS: Buchanan's point is that they don't. Take television. The programs are chosen on the basis of what pays, and apparently nothing pays except Westerns and soap operas.

MURRAY: If it be true to say that they don't do it, then there is nothing that the law can do to make them do it.

BUCHANAN: I think that if you emancipate them from their present masters and give them a master who has a public good in mind, you would have more.

DOUGLAS: Who would be the master?

BUCHANAN: The people.

HUTCHINS: It is altogether too technical a way of looking at the subject when you say there is nothing law can do to make the broadcasters do it better. You may be right if you are looking at the law very narrowly, but look at what other countries have done by state intervention and state competition.

ASHMORE: There is no proposition like that in the Constitution, and the reason for my leading question is that there comes a point where somebody has to determine what the truth is. Once you start propagating truth, it seems to me you go very rapidly into suppressing untruth.

BUCHANAN: Yes, when you say somebody has to decide it. The purpose of this institution would be the provision of truth and untruth and the freedom for every individual to decide, and at present you haven't got that freedom. Freedom is restricted in all sorts of ways.

ASHMORE: I don't know how it is restricted by law anyway. I don't know anything that would prevent one from disseminating the truth. The problem is to find the means for doing it.

Consensus and the Law

MURRAY: Speaking of law, I'd like to ask Mr. Buchanan: Is it not true that you are somehow in your deepest viscera exaggerating the value and efficacy of law to do all the things that it might be highly desirable to do? Am I right in thinking that underlying your position is an aggrandized and exaggerated view of the efficacy of the law?

BUCHANAN: You may be seeing deeper than I see when you say that.

HUTCHINS: I thought you and Mr. Buchanan had agreed on the scope of law.

MURRAY: We have, but here is where our contrary dynamisms come in. After we have reached this basic agreement, namely, that the law is a pervasive force in society, then the real possibility of disagreement comes from Buchanan's trusting too much in the efficacy of law, from wanting law to pervade more than I would want it to, perhaps.

BUCHANAN: The way I see it is that we are now suffering from a great deal of loose power. I am not for doing everything by law—this would be silly, of course—but I am so sure that we are so far over on the other side that I want to push over to this side now. In that sense, I am being political, but it seems to me that there is a very important balance that must be struck.

MURRAY: I think we are assuming too much from face number one and also from reckless applications of face number two because we don't understand their implications. Philosophically, our theory was always number one. When we start to move into face two, we feel uncertain because there are not enough norms that have either been accepted or at least generally enough accepted. There has not been enough thought about jurisprudence. It has to do with the pluralism of society. It has to do with public opinion, which is largely public passion. In other words, face number two, which is a very hard one to adopt reasonably with political success, bothers us very much. If all you mean is that you would like to move a little more into face number two, I say yes. The difference would be, it seems to me, that I would move a little bit more cautiously

than you seem to want to move in, for example, the whole field of education. If what we need is higher educational achievement, as we indeed do, you want to apply face number two and to do it through the use of political means. I say, now wait a minute. Let us take another look at this one.

BUCHANAN: I have a very brief answer. I am assuming that we will not learn how to operate number two unless we try it. We have to go into it before we find out how it works. We would make a lot of mistakes, but it seems to me this is a risk we have to take.

MURRAY: And I would support you to this extent, that I do not believe the first step into face number two means that we have set ourselves on the high road to totalitarianism.

HOFFMAN: I would be grateful if Mr. Goldman, who I understand is the principal exponent of the distrust of some kind of centralized control, would make clear how and what his distrust arises from.

GOLDMAN: I would say that federalism number two leads to totalitarian solutions in certain cases. The only time federalism number two would not resolve itself into totalitarianism is when there is a consensus in a country.

HOFFMAN: Could you define totalitarianism?

GOLDMAN: Yes, the arbitrary assumption by some board or commission of the power to make decisions about important matters.

HOFFMAN: Does it become arbitrary in your definition because somebody, a group of legislators, had made a law that is not readily acceptable to everybody? Is that totalitarian?

GOLDMAN: No. This is why—

HOFFMAN: But a board could operate under law that is achieved in the proper legal fashion.

GOLDMAN: It is impossible to make such a law about certain subjects. Let me explain. If in the United States there is a broad, general feeling that government medical insurance is a good thing, and you move to federalism two in that field, you don't necessarily get into totalitarianism as such. But with respect to education, it seems to me that there is and will be no consensus. In fact, there are deep and unbridgeable gaps, and the only way some central board could possibly rule on this is by arbitrariness.

HOFFMAN: In other words, if I understand you, it becomes arbitrary and totalitarian when you move in a direction that the consensus does not support.

GOLDMAN: In which there is no consensus, that is right.

NIEBUHR: Take the difference between Prohibition and segregation. We had a law, a constitutional amendment, on Prohibition, but it broke down because the local communities didn't support it, and all the heavy-handed federal laws didn't make it work. We had a law about segregation in the Constitution, equal liberty before the law. The Supreme Court in 1896 was rationalizing when it said "separate but equal." The Supreme Court made its decision, and still you got a tremendous resistance. But gradually the national consensus overwhelmed the Southerners, and so the Supreme Court very prudently decided to take the risk. This is the way that law and standards work dialectically with one another. Buchanan is trying to put too much emphasis on the law.

BUCHANAN: I admit your problem. This is the problem of all legislation, to find out whether legislation is needed. But you don't want to prejudge this, do you?

NIEBUHR: You remember that the distinguished members of the Supreme Court follow election returns in some ultimate way, and this is what the Supreme Court did in 1896. In some way they developed this very unconstitutional principle of separate but equal.

BUCHANAN: The principle is the same. They were using a federal judgment in this case against some local feelings and local opinions.

NIEBUHR: But you see, the 1896 court said, in effect, we want to press the national consensus upon the South, but we won't go too far.

BUCHANAN: Well, I think any legislature or any court would know about that.

NIEBUHR: I say your ultimate question cannot be answered in an ultimate abstraction. No political question can be answered in principle.

HUTCHINS: In principle it can.

BUCHANAN: In principle, laws have educative as well as other effects. They do change the consensus. This is a truth, isn't it?

NIEBUHR: Yes.

BUCHANAN: Now, there are cases where it is very difficult to make this work. It is true in principle but difficult in practice.

ASHMORE: Both the 1896 decision and the Brown decision are serving the educational function. They are bringing about the consensus, and they are bringing it about more rapidly than otherwise.

BUCHANAN: Both of them have played this part very strongly.

DOUGLAS: Separate but equal was a revolutionary concept in its day. To a man born under the old regime the recognition of equality of treatment even in a separate building was revolutionary.

NIEBUHR: And it prepared the way for the decision you gave a few years ago.

DOUGLAS: I am not sure it was meeting the consensus. It may have been way ahead of it.

The Influence of Technology

BURDICK: I have some troubles with the latter part of your paper, Mr. Chairman, where you state that there is a new and dangerous technological threat. Could you talk a little bit more about that? Why do you think we are in some sort of a crisis?

HUTCHINS: Well, how long do you want to go on? I don't see how you can deny this, because when we had Mr. Herman Kahn here recently, he informed us that we couldn't make any statements that were of the slightest value, because within the next fifteen minutes there was going to be a technological change that would make obsolete everything that had been said up to this point. We have discussed this subject in the context of foreign policy and military affairs many times. This is, of course, the most obvious

example. I think Father Murray once went so far as to say—Mr. Rabi as usual dissenting—that we made military hardware because we could and not because we knew what we were going to do with it.

We had Mr. Louis Kelso here from San Francisco on one occasion, and the brain reeled. Mr. Kelso had made a catalogue of the immediate technological changes that he knew about as they affected industry, so that 90 per cent of the longshoremen in San Francisco were now out of work and operating under a subsidy plan, since the new method of loading ships had made their services unnecessary. We had here recently twenty-five or so potentates in labor and law and industry who spent three days or more discussing technological change, although they were brought together for an entirely different purpose. They were brought together to consider the crisis in collective bargaining, and they immediately located the crisis and the problem: whether collective bargaining could cope at all with the technological change that they regarded as the overwhelming factor in contemporary history. And they reached the conclusion that it could not. Now, I could go on and be as detailed as you like, but I think the one thing we have come to take for granted, on the basis of the testimony of one visiting individual or group after another, is that the rate of technological change is increasing geometrically.

BURDICK: Where is the evidence that legally we are not able to grapple with it? Take the longshoremen. They have worked out a deal. Do the people in the trade union really think it is hopeless?

HUTCHINS: I won't say that they consider it hopeless, but they insist that it is new, and if our institutions are going to be able to cope with it, we are going to have to think about these problems in entirely new ways and do entirely new things.

MURRAY: Where do you locate the worst problems? It could be on two levels: The rapid pace of technological change simply complicates things enormously in the practical order; the decision-making process or, if you will, the institutionalization of society becomes increasingly difficult. Or the pace of change tends to create a climate of intellectual opinion in which you don't believe in anything else except change. You also become inclined to think that the possibilities of change are unlimited, as indeed they are from a scientific and technological point of view; anything can be

done and anything can happen, and there is no principle either in science or technology that would force a selection.

HUTCHINS: We have been concerned about the first, about the total pervasive alteration in ourselves as individuals and in our society.

NIEBUHR: The labor conference here had a fascinating dialogue between management and labor. They were saying not that it is hopeless, but that technology had developed—and they used the word—a new feudalism, as against the old feudalism, and that the collective bargaining process which our law had provided to establish an equilibrium between the two centers of power was no longer effective. It is interesting that management and labor both agreed that collective bargaining can't now protect labor and can't even prevent technological unemployment.

BROWN: I don't think the question of technological unemployment has thus far been fully appreciated. As a matter of fact, it hasn't really been fully felt yet. One of the reasons is that, as our productivity has gone up, thus far labor's share relative to the share of the capital remains constant. But that can't go on forever, and we are going to be entering a phase very shortly where the rate of capital growth is going to outstrip that. Just the fact that our labor supply has not been increasing as rapidly as the economy as a whole—nor has it been increasing as rapidly as the population as a whole—is an indication that this is due to a fluke because of the people entering the labor supply now. In 1965 we will be out of that phase, and I would anticipate a tremendous upheaval starting about then.

NIEBUHR: They didn't discuss as fully as they might the implications of the "depression babies" that are coming into the labor market, but I was impressed by the fact that they realized that the unions, left to themselves, would do things like building up welfare funds, or pricing coal out of the market, or dealing in feather-bedding, etc.

HUTCHINS: We had testimony from one industry after another about the degree of underemployment.

BROWN: I spent some time at the UAW summer school, and, of course, their particular union is being hit rather hard by technological unemployment. The question I like to ask—and you never

get any answer—is: We are moving in a certain direction; changes are taking place where it takes fewer and fewer man-hours to produce a given quantity of goods. What kind of government are you going to have when you approach the situation where nobody works? Let us assume that all the essentials of life are in effect produced for you by a machine. You will never reach that, but you can approach it. What kind of government are you going to have then?

FERRY: These men at the collective bargaining seminar, both labor and management, agreed that collective bargaining as an instrument wasn't adequate at all to cope with prospects such as this. What they would do would be to handle dinky little situations, as the longshoremen have done, but it is far too complicated and they couldn't see the end of it. Instance after instance was given of the inability of collective bargaining to deal with particular situations.

One question they decided not to talk about was the effect on non-organized workers, those people who have never been successfully organized and who are by far the vast majority of workers. Of these workers the ones who are more susceptible than any of the others to technological change are the paper handlers in the factories and in the industries, those people who just handle data of a certain kind. These are the people of middle-management, the ones that Herbert Simon of Carnegie Tech says may be completely disemployed in twenty or twenty-five years because of machines. Collective bargaining obviously cannot help them, because they are not unionized, and therefore bargaining cannot do anything about these people. What is society going to do about it?

GOLDMAN: Suppose everybody has full leisure. Government will go on doing what it always has done, trying to keep the show on the road.

BROWN: Who is going to decide who is going to get the goods and services?

RABI: Hasn't this already happened? We can remember when the farmer worked from early morning to late at night, and now he has got down to a forty-hour week. This has happened, so we don't have to wonder about these things. We have something to extrapolate. You are not visualizing any greater change than the change

that has already happened. You can go to some of these large chemical plants, and you see nobody around.

BROWN: No, I think the changes in the future can be greater than the changes in the past.

RABI: You go down from a forty-hour week to a twenty-hour week. What of it?

BROWN: A decision has to be made as to whether or not you are going to employ one man who is going to work fairly steadily or whether you are going to employ a whole bunch of men each of whom is going to work only a few hours.

RABI: All over the world there is even less unemployment. In Europe, even though they have a great growth right now in industry and the introduction of new machines, there is a tremendous labor shortage as new industries and new desires come along. I am not saying that I know the answer, but I think what you are talking about are the fringe problems that arise as one or another industry or technology comes in.

NIEBUHR: I don't think that Brown's question about what government can do when nobody works quite deals with the problem, because doesn't the role of government get more and more important as you approach this point? Meyer Kestnbaum at the labor conference raised the point of foreign competition. The unions couldn't solve it and management couldn't solve it, because in collective bargaining they would run wages and prices up, and then you suddenly find yourself out of the market as against the lower prices of foreign products. The tariff walls are going to disappear in our kind of world, and only government can deal with these complex factors.

RABI: Not necessarily. The United States had a tremendous export industry in automobiles and now it is largely gone because Europe has no American car import. This happened not because of labor and prices and fewer working hours, but because we decided to make a kind of funny automobile that nobody really wanted. It was a decision of management, based on poll-taking. I don't know what government could have done about this, if we mean government in the sense in which we have been discussing it. If you mean a more precise definition of the role of industry, including both management and labor, that's another matter.

The Rise of Private Enclaves

GOLDMAN: When the Chairman says—and it is implicit in his paper and in this discussion—that technology is going to require a larger and larger role for government, it seems to me that another hypothesis is possible: that government will do more and more things that mean less and less to people; that is, it will make certain decisions—economic, defense, etc.—but the area of life untouched by government may become more and more important to men. It is possible that we are entering a kind of non-political era. I would say this is implicit in the way many people are living and talking at the present moment. I don't see why your automation situation might not contribute to it.

BROWN: On the other hand, could it not accentuate the trend toward a welfare state as you approach a situation where people are out of work and your working week is extremely short? Then you look to and become dependent upon the government to furnish you with your medical care and with the bulk of your goods and services.

GOLDMAN: That is not necessary. The other way could be that obviously the government would make certain vital decisions, but what a man did with his life would be more and more removed from the government; that is, what he did which seemed of special importance to him. Over the years Americans have attributed a great importance to the political community—federal, state, and local. I am suggesting the possibility of a reverse trend.

NIEBUHR: If I understand your argument, you would say that this new feudalism would work as the old one had, and the ultimate government of the community would not have so much authority because the feudal baronies would have more control. But I don't think it will work that way because there is a great difference between the new feudalism and the old. That was an agrarian society, and the new feudalism has all the complexities of a technological society. In this new feudal system there will have to be an equilibrium of power between these baronies, and the government has to provide that equilibrium.

GOLDMAN: I am bringing up the possibility that we may be entering a new non-political era in the sense that men will be less emotionally concerned with areas affected by heavy governmental activity. For example, a man's occupational life – certain to be affected a great deal by governmental activity—used to be of great importance to him. But perhaps now people are building private enclaves in their lives.

KELLY: This is the third alternative that the paper talks about. But aren't you leaping very lightly over the vital decisions that are going to have to be made? Do you go as far as the European third concept that Hutchins mentions in his paper, the position that involves the abandonment of democracy and any democratic notion that participation in politics is desirable for the individual or the community?

GOLDMAN: That is an extreme statement, but it goes in the same direction in the sense that it is an expression of a lack of faith and interest in the political process. I would have no evidence to prove this. This is one of these feelings you get.

HUTCHINS: Hannah Arendt's prediction in *The Human Condition* is not unlike this. Everybody retreats into privacy. The analysis of human beings is no longer of human beings; it is of human behavior. She makes the remark, which is worthy of constant quotation, that the trouble with present doctrines of behaviorism is not that they are wrong, but that they might become true. She takes the statistical approach of social science as characteristic of the public abandonment of political action and retreat into privacy. You are nothing any longer but a statistical unit or an item in the Gallup Poll.

MURRAY: It seems to me a little significant that this trend Goldman has noted, and I think justly, is accompanied by another. I understand from those who know about it that one of the public debates which has to be entered upon is precisely the definition of what is now called the public sector. This is largely an economic problem, but if there be an issue of some magnitude, this is it. In other words, there is an area from which you may not retreat and about which you are at least supposed to have some sort of opinion. The notion of just letting it all go, even letting it all go to the experts, will not do, because the problem exists and it may not be disregarded, whatever be one's interest in the cultivation of

one's private life. Citizenship itself requires some sort of opinion if it is to be intelligent citizenship.

GOLDMAN: I would put it a little differently. It seems to me that we go through a kind of cyclical pattern in our national life. There are periods when the general public is concerned with the social and economic opportunities in the United States. Then it swings to an emphasis on private concerns, to concern over a kind of enclave in which the individual can exist. It seems to me that we have swung to a period of that sort, which has been accentuated by the widespread feeling, right or wrong, that there is little or nothing you can do about public issues, or little or nothing that is certainly good. The two public issues that are most on people's minds are, first, the foreign policy problem, which many people feel is out of their hands, and, second, the eternal question of civil rights, about which I suspect there is more talk than real conviction. This doesn't affect the feeling that there is a public problem there. People seem to feel, something has to be done, but let somebody else do it, and don't let it get into my real concerns as an individual, this little enclave I have built for myself. The books that have been very popular in post-war America, books like *The Lonely Crowd, The Organization Man,* or Salinger's fiction—as far as I can see, the only kind that really means anything to the people in their twenties or thirties—these books have only one theme, the overwhelming and oppressive system, and how in the name of God do I get away from it. As White implies, you don't even fight it any more. You pass it off as a joke by cheating on the personality test.

ASHMORE: This is one of the things in the Democratic convention that I thought was very good. Some people seem to be worried that the delegates came there with their minds made up. There is nothing wrong with this. It is the end of a process that has been going on for at least twelve months. It is true that the view in Los Angeles before the convention started was that Kennedy was going to be the presidential nominee, but we didn't know who was going to be the vice-presidential nominee and we didn't know what the platform would be. This was true in both the Democratic and Republican conventions. The only thing certain in the Republican convention was that Nixon was going to be the presidential candidate. I think that in both of these conventions we saw the political process in this country working. You may say the platforms don't

mean anything. I think they have included in them some of the most difficult domestic issues, such as race relations and civil rights. Probably these two conventions foretell more progress in this respect than we have ever had in the history of the Republic. The positions of these conventions mean that the issues won't be left with the platform committee, but there will be political action, no matter who is elected. It will be taken at the federal level, and it will be taken with the acquiescence of the South, and I think this is no mean achievement.

GOLDMAN: That is not what I am talking about. What I am talking about is that I sense no emotional commitment. I quite agree with you that there is going to be progress in civil rights, but I suspect it is going to come because a lot of people say, well, when the Negroes get enough power in society you have to get along with them. You can have progress without having any sense of commitment. As a matter of fact, maybe you get more.

HUTCHINS: I interpose no objection, but you are not arguing with the paper. The paper doesn't raise the question whether we are going to have enclaves of privacy or whether we are all going to be under governmental domination as a result of technological developments. The paper simply points to the fact that technology has reached a stage that requires us to take a very new look at a very new world. The paper says that no matter what side of federalism you like, you have got to be worried about technology.

GOLDMAN: Maybe the question is not the faces of federalism; maybe the question is: How do you have a good society, in which federalism and all of its faces thrown together may be relatively unimportant? The basic argument, it seems to me, is the argument that I tried to express before: Do you have a good society by trying to set up certain norms of justice and build the instrumentalities toward that end, or do you build a good society by building your instrumentalities so as to try to keep as many people as possible feeling reasonably happy and then let the norms emerge?

HUTCHINS: I admit that there you would have an entirely different society, but I can't conceive a society that would be reasonably happy unless that society thought the government was trying to establish norms of justice.

The Natural Law

HUTCHINS: It is agreeable to you to go on to unity, the consensus, and natural law? I would say that when you talk about Holmes, Hand, Berle, and de Jouvenel, you are talking about people who agree that there is no standard of political action and no visible purpose of a political community that would enable you to criticize the decisions of the majority. I would say that Murray and Niebuhr seek to provide standards by which the decisions of the majority could be criticized—Murray with the tradition of the West and natural law, and Niebuhr by the statement that the consensus, if it is to be a real one, must evoke confidence in the people that the government is moving toward justice. This is normative and not merely a descriptive element.

NIEBUHR: In your paper, Mr. Chairman, quite obviously you are not the yearning type, but you yearn—. You object to legal positivism. You reject it, and I think quite correctly. You don't want the Constitution absolutely normative because we might want to amend it. In other words, you are saying that we have a historical norm but there must be something beyond this. There must be a more ultimate standard than the national standard; otherwise we become excessively nationalistic. Murray supplies this and relates it to the American tradition. He says there are self-evident truths. He says there are certain truths that we hold as certain and we lay them down as the foundation of the political society. He rules out, in other words, not only Thomas Jefferson in the eighteenth century but a good deal of natural law theory —that is why he is my favorite Catholic theologian. He rules out intuitive reason, but he says the truths in question belong to the order of reason. Now, this is what I really want to analyze, "belong to the order of reason." If you rule out intuitive reason, then you have got logic. There is a whole theory of natural law that all the truths of natural law proceed in a logical manner from its preamble that we must do good and avoid evil. I think this has the same fallacy that Kant had, that you can draw a material ethic out of it. I think you could say in a general way that there is an order in things which reason can analyze and discover and that truths are the products of reason reflecting on

human experience. Murray says the natural law is that which follows in an inevitable manner from the fact that man is man. That is analytical reason; it is empirical reason. The real stuff is not reason but man, and with that I agree. Now comes the difficulty about historical relativity.

MURRAY: When I say "man," I also mean historical man.

NIEBUHR: Of course, you emphasize that too. I don't think I am getting ahead of my argument. I don't think you emphasize historical reason.

MURRAY: Well, go ahead.

NIEBUHR: The only natural law that almost all of us can accept without presupposition or without creed is that there is a common humanity that makes Christian and non-Christian secularists, etc., feel that what the Boers are doing in South Africa is awfully bad. There is some ultimate concept of human responsibility towards man and acknowledgment of the dignity of man. But when you get to the particular, you find the whole question about the historical relativity of reason. When you accept the historical relativity of man, you do justice to the concept that man changes and has an evolution, and to the judgments by which people say, "I find this to be true about man and about his relationships." You yourself, Murray, are relativist in the sense that you find it comes down to the natural law as we conceive it in the West. For instance, if you say monogamy is good and polygamy is bad, you also have to say, "Asia doesn't accept that." And this is relative. But perhaps it must be more than a Western concept after all, because the President of Tunisia said he was going to try his best to rule out polygamy in the Islamic state owing to the fact that he thought it offended the dignity of women. Now, my point is: Was he grasping for a universal standard or was he corrupted by the fact that he had a French wife, and that monogamy is a Western standard?

There is a point where everything flows between the ultimate and the historical. I think this is particularly important when you get to our relationship with Russia, because if you simply say the ultimate standard is the Western standard as it has been perceived in Christian history, or pre-Christian, Greek, and Hebraic history, you get nowhere. Living in this terrible situation, living in this hell really, and finding no way out of the hell by

abstract principles of law or abstract principles of world government, I think we will get to some universal government partly through building up the United Nations and partly through Russian and American partnership. Now the question is: How is this partnership going to have a moral foundation? The Russians don't believe in the moral law as we understand it. In our conventions we say that this is the difference between freedom and despotism. I think that is a moral obscuring of the very pressing historical needs of our day. The historical need is some kind of political life, some kind of political agreement, which must be built up ultimately in some kind of community, and that community must have some kind of moral principles. The moral principles must maximize what is common to us and to the Russians — and there *is* something common.

DOUGLAS: About the best place to start on that, I think, would be Vermont, because the revulsion of the American colonies to royal judges was so great that in many of our colonies, as you know, laymen were put on the bench. That has persisted to this day in Vermont, where the judge presides, and there are two farmers who are elected and get three thousand dollars to sit with the judge and overrule him if they wish. Today the same thing exists in Russia, because they had the same experience with the Czarist judges who were also tyrants. They put two laymen on the bench. If you go to Russia, you see two factory workers sitting up on the bench with the judge, and they are elected, and they are also paid a salary. This is a good place to start with a community feeling about justice and bad judges.

NIEBUHR: Take Khrushchev. Here is a man who can no longer rule out his enemies by terror, because a society has grown up that won't let him. He maintains his rule by artful political juggling of the various oligarchies, by using the Communist oligarchy. This is political, not moral, but if you analyze this political situation you will find that there is a possibility of community there. Our business is to find a higher level of partnership. I don't see how you can find it except by emphasizing the historical similarities between us and the Russians. The Russian Messianic concept of justice is not against the West. That is a heresy that grew out of the West. It went from the West to the East. It is part of our common history. The contemporary part of our common history is that we are actually partners and that

this partnership can only be viable if it becomes, not a moral partnership in the sentimental sense, but one in which we find some affinities. In other words, we must recognize the relativity of our culture and say that this Western civilization, on the one hand, is the ultimate civilization, but that it is also a cockeyed civilization because it is so luxurious that it arouses the envy and contempt of the rest of the world and of the Russians. These are the things that we have to recognize; in other words, a more historical moral law and natural law.

MURRAY: I think Niebuhr raised an enormously difficult question in the latter part of his remarks, namely, the question of what are the factors that would go into the building of a world community of some sort in terminating some of the radical divisions of today. The factors would be very many. One that is coming to the fore is sheer self-interest which, of course, is a powerful factor in all human and national affairs. And when it comes to the problem of finding a community of interest between nations, or between regions each with sovereignty, the factor of interest ranks very high. The relevance of natural law to this would be only part of a much larger subject. Niebuhr is certainly right in saying that the building of this community is going to be a historical work, not only in the sense that it will be done in history, where everything is done, but history itself will matter very tremendously in the doing of it.

On the first part of his remarks, I will comment merely by stating that the theory of natural law is simply not understood. It is identified with intuitionism. It is identified with logicalism. These are historical conceptions, mind you, which have been around for some time. Then there is the one that has been advanced here that it is really Kantian in spirit and structure. You start out with a formula that is something like a magician's hat, and out of it you pull all sorts of moral precepts of one sort or another. This is philosophical and moral nonsense. It is also identified frequently with the type of law that obtains in cosmic nature where determinism reigns; whereas natural law applies, in my belief, only to the free human being. My conception of natural law is that of the free, intelligent human being living in history.

NIEBUHR: You say that the consensus of America is to build on the tradition of the West if it is to be normative, and this I would say is historically relevant. Now, I would take the tradition

of the West and the historical relativity and the absolutism a little further and say that a really normative principle must transcend the West and appeal to the humanity of all people in some way or other. I think the whole history of the law of nations or of the communities of nations in the Christian West has put an excessive emphasis upon order, first, because chaos means non-existence. Then gradually comes justice. Because of the vitalities of culture, justice comes. All nations accept the fact that they must have order first. I would say that in the international community we stand where France and England stood when they paid an excessive price of justice for the sake of order. Then came the vitality that went into the seventeenth and eighteenth century revolutions, and all the descendants of those revolutions made the aim not order, but some higher justice. Now, we are always speculating about how you can make it higher. I think these things have been in our history, and I think the question is: Can you project them into the international community? We will have to put order and peace first, because for the nations of Europe that has become a matter of existence or non-existence. But order isn't enough, because we have got to build on this order some minimal and common conception of justice. It has to be more historical and say: What are the common conceptions of justice between us and the Russians? Well, the passion for justice is certainly common to both nations. They say we are imperialists. We say they are imperialists. And we are both right. In other words, we accuse each other of original sin.

HUTCHINS: May I make a suggestion? There are numerous confusions about the natural law. One can find still others that haven't been mentioned here. I think it would be useful if Father Murray would give us a simple, clear statement of the ABC's of natural law so that we know what we are talking about.

DOUGLAS: Could I make an addition to the question: to show natural law as something that is not peculiarly congenial to our own country or to Europe, but something that would be congenial, say, in the steppes of Russia, or the world of Mohammed, the Hindu world, the world of Confucius?

HUTCHINS: I would say, Father Murray, that when you talk about the tradition of the West you are not in any way limiting the

application of the natural law to mankind as a whole. You are describing where it originated and flourished.

MURRAY: Yes. When you speak of the West, inevitably the word carries geographical connotation. When I use the phrase "natural law," I use it in a much more symbolic sense, not that I divorce it from geography or what I call the tradition of the West. Its origins are certainly very prominent in Greece, or in the Grecian, Roman, Stoic, and very important Germanic elements, especially as they have coalesced into the construction of the concept of the law. It seems to me that there is a particular concept of natural law that has very ascertainable historical origins which have been pretty exhaustively chased. I am referring to a tradition that has a geographical origin in what we call the West but that transcends its origins. It represents the acquisitions of the human mind and spirit reflecting on the meaning of human life as it has historically developed. My theory of natural law—and it is here that I separate myself from the seventeenth, eighteenth, and nineteenth century series of abstractions—like any philosophy, has empirical origins. It is through the observation of experience. This leads to the question of the relationship between humanity and the West. As I understand the question, in the intellectual and spiritual sense humanity is the West, or the West is humanity; that is to say, it represents the highest achievements, in its best moments, of the human spirit as it has reflected upon the basic problems of human, social, and political living together.

I should say parenthetically, Dr. Niebuhr, that you continually confuse me in your multitudinous, multifarious, and always enlightening remarks by the way you use order and justice. When I think of order, I would use justice as a synonym. Freedom and order, freedom and justice, seem to me to be equally valid statements of the basic tension. An order is the order of justice, and the thing that the order of justice primarily requires is freedom, because the basic thing that is due to men is freedom. When I use these two terms, they are complementary concepts to me, and you always seem to use them antagonistically.

NIEBUHR: I agree that the two regulative principles are justice and freedom or equality, but both of them are relative principles. Freedom in a certain degree is a peculiar contribution of the West, and I would put a greater emphasis on the Hebraic than on the Hellenistic tradition. The Hebraic tradition has a peculiar, illogi-

cal, incongruous concept of the self that is body, mind, and spirit all in one, and the spirit transcends the body. I think that without this Hebraic conception you wouldn't have got any assertion of the individual. In Confucianism you have a family system that doesn't allow for the freedom of the individual, so Confucianism is not of the West. Nevertheless, when the Chinese Communists established collectivist communes, I think it is possible that they incorporated some of the Western ideas that exist in the Communist doctrine, and one is that there must be more freedom of the individual. All these things sway between the universal and the historical. I think you are quite right in saying that if it really corresponds to the structure of human nature then it can be transported and learned.

MURRAY: When you use the words universal and historical, would you be prepared to admit that the universal emerges through the historical?

NIEBUHR: That is what I am saying.

MURRAY: If we leave out the word "historical," for instance, and use the word experiential, would that help?

NIEBUHR: Yes, that would help.

MURRAY: The principles that I arrive at are derived from experience, with a component added. I say that the experience does not systematize itself. You cannot make sense out of a fact by adding another fact. You have to add some other component to make the sense. Otherwise, you have an accumulation of facts. You can accumulate facts indefinitely, and this is part of the scientific procedure. You have to hypothesize to make sense out of your data.

The simplest statement that I can make is about the suppositions of natural law. The first is that man is intelligent. He has capacity for understanding. He can understand himself. He can understand his experience. He can understand others. He can understand history—not indeed comprehend, but I say understand.

The second supposition is that reality is intelligible, and by reality I mean the totality of the human reality that is summed up in the somewhat symbolic word "nature," nature here not being some sort of abstract essence hovering in the sky somewhere. This is frequently understood—and misunderstood—to be the basis of natural law, as if you had some sort of essence up there that we

call human nature and abstractly you analyze it and then with equal abstraction you deduce from it certain results with regard to human behavior. This is completely false as far as I am concerned, just as the opposite is false, namely, that the natural law seems to be a purely visceral sort of thing. Reality, I say, is intelligible. I can understand the human reality, what man has done and why he has done it. I have this capacity, not simply to analyze but to make this analysis of a collation of human experience, and a collation that induces very strongly the pragmatic principle. I can see through historical experience that certain things work well and other things don't work so well, and other things don't work at all.

The third supposition is that when reality is thus understood—that is to say, when you have collected the facts, have subjected them to the light of reason, to use the ancient image—then it is possible to understand what a man ought to do, simply because he is a man.

Now, with these three suppositions thus explained very briefly, the next point would be the level of law. It would be awfully nice if you could get some other word besides law to define this, because so many connotations have clustered around the word law that I prefer to use the Latin. In Latin we speak always of the *jus naturale*. The next point would be to illustrate the levels of understanding that go into the structure of this theory. First, there is only one that is intuitive, namely, that the same thing cannot be affirmed and at the same time denied under the same aspect. This is a violation of the intelligence, and the mind intuitively sees that this is true. This principle applies to the moral order. If it is not true, then we might as well give up our enterprise of deciding what is good and therefore is to be done, and what is evil and should therefore not be done. If this principle is not true, then the whole moral enterprise might as well be surrendered from the outset.

If you accept the principles, then you face the question of what is good. What is the good that ought to be done? What is the evil that ought to be avoided? To answer these questions you refer to experience. To take a basic thing—that parents are to be honored, the third precept of the Decalogue—how do I know that this is true? I know it by understanding what a parent is. I acquire through experience an idea of the relationship between myself and my parents. I also get to know as a child the basic content of the

word "honor," and I see this not intuitively. There is a certain amount of reasoning here. I have to experience parenthood or childhood or the relationships within the family. I have to do a very simple sort of reasoning, such as a child is capable of. I then arrive at the decision that this is a dictate of my nature, and I thus, simply because of the fact that I am a man, and a man in the status of a child, am morally obliged to honor my parents.

The situation then becomes increasingly complicated as the human reality is explored, and similarly the process of reasoning becomes more and more difficult until you get to the point—and I think this can be cited as an example, say, of labor disputes—where the facts of the situation are enormously complicated, and moreover the reasoning that is required pre-supposes technical competence. In the course of its unravelling, obviously mistakes can be made, which is why the thing is better done collectively, since what you want to arrive at is some practical judgment as to the requirements of justice. What are the requirements of justice, of fairness, of the fair shake, which you want to come out of this highly complicated situation?

These, broadly, would be the three levels: There is the intuition, the moral *a priori*, as I call it; there is the basic human situation, the rules for which are prescribed in the Decalogue; and then there are the remote principles of natural law, which are arrived at in part through an analysis of the more advanced and complicated situations, especially the institutional developments of society throughout history. It is frequently very difficult to know precisely what the requirements of morality or justice are in a particular situation, and this is why in his works St. Thomas reserved the solution of these really complicated problems for those whom he called the wise, and whom I think I would call the wise and the honest.

NIEBUHR: I happen to be the son of a German immigrant who fled from his home because his father was so tyrannical that he couldn't stand it. This was a sort of corruption of the natural law. And I say also that the American home distinguishes itself from those of the Continent by going to the other extreme: Our children honor their parents by amiable disrespect.

MURRAY: This is perfectly true. The concept of honor can and does vary, but the variations in the content never destroy the imperative character of the precept itself. The word "honor" always has a

meaning, and the precept itself always bears an imperative character. You may say quite rightly that the attitude of a Bavarian grandson or daughter towards the patriarch at the head of those communal houses, almost villages, that they have in Bavaria is very different from the concept of honor that obtains in the United States, and you can compare the values involved in them.

DOUGLAS: My difficulty is that you are talking about such a small percentage of the people.

MURRAY: Admittedly.

DOUGLAS: It seems to me that this is a parochial rather than a universal view. I don't see how you would apply this to the Buddhist world, for example, or to the world of Islam. Your precepts are perhaps good for this group and for this town, but I don't know where the universality comes in. I thought we were using this as a basis for reaching the peoples of the world, for a community of nations, for the conduct of people and standards all around the world. But Islam today in Africa has ten converts for every Christian convert. Islam in Africa has 87,000,000 people and Christianity has 22,000,000. And that is just Africa. The great central point of Islam in Africa is the race issue, that Christianity is a white man's religion.

HUTCHINS: The attack on Father Murray's proposals as a basis of a world community has to be that the ideas are either no good or unacceptable. It doesn't seem to me that you can establish *a priori* that they are unacceptable. It may be that accidental circumstances, such as the fact that our missionaries were white, have created the impression that the natural law is in some way a white man's law.

DOUGLAS: No, I would think that the search for natural law would be through all the different moral concepts.

HUTCHINS: Father Murray has to contend that the principles of the natural law are in fact, when understood, acceptable to all rational human beings, no matter where they were brought up. He does not have to say that they can accept them today.

MURRAY: A group of Jesuits made a study of Hinduism in India with a view to determining whether, where, and how far you could interpret it in terms of the natural law. They concluded that such

an interpretative transposition was entirely possible up to a point. It has been many years since I have read about it, but, if I recall correctly, one of their major problems had to do with what is technically known as variations in modes of thought. You have the symbolic mode of thought. You have the thing that Albright, for instance, calls "proto-logical" thinking, in symbols, in images, such as God is a rock. You also have the kind of thought that is inter-subjective, or inter-personal, or descriptive—a phenomenological thinking where I don't say what the thing is but what the thing seems to me to be, as against the affirmative mode of thought which says what the thing is in itself. This goes on in science. I take it that it is the object of science to state what the relation is between the things themselves, and not how they appear to the eye of the beholder. That is the first stage. These stages and these modes of thought are ordered in a progression. The child thinks only in inter-personal terms. He thinks about mama and papa, and everything is related to another person somehow. Getting an idea that transcends this level comes later; it has to develop. The same is true in culture. So the group in India found that, by reason of the modes of thought and utterance proper to Eastern philosophies, there were certain things that either could not be transposed, or you didn't want to transpose them, just as I don't want to transpose the Old Testament into Scholasticism because I think it would ruin it as a valid expression of its own modes of thought and because you would then be putting them in contradiction with each other, whereas they should supplement each other.

MILLIS: There appears to be an insuperable bar to the use of natural law in the world view.

MURRAY: A difficult bar, I should think, but not insuperable. First of all, you may not want to overcome it. Berle describes the way things are run in the United States, how the public consensus is in point of fact built up, arrived at, discovered, whatever you will, and then made somehow controlling of actions. You may not want to go beyond this descriptive method of thought and into the realm of what is undoubtedly an abstract interpretation of this description.

ASHMORE: Assuming within this system that we could get an area of agreement to reconcile the philosophical differences to a point that would permit us to have a common understanding of some matters, could this form the basis of human conduct?

MURRAY: Yes, I think that would be entirely possible. How stable such an achievement might be might well be another question.

RABI: Could I ask how you distinguish the natural law from psychology and sociology?

MURRAY: I don't.

RABI: Then it is as tentative a process as those. You have the same contingent values that a scientific structure has, the theory of relativity or Freudian theory, or whatever. Is it constantly being compared with empirical observation?

MURRAY: Yes, it is constantly developing and growing out of experience, as experience requires understanding in order to be mastered.

RABI: Let us say that we have human conduct subject to principles by which it can be understood and by which it can be ordered rationally to a greater or lesser degree. Are the fundamental assumptions always subject to question? In other words, is this the same relationship as the scientific method has? Is it analogous to the natural and biological and social sciences?

MURRAY: No, it is quite different, basically because the body of experience on which it rests is entirely different.

RABI: Then it is a different discipline?

MURRAY: It is different from science in general. There is such a thing as common experience.

RABI: This you did not bring out, and I don't know why you say so, because actually one never knows. For thousands of millennia nature was thought to have a certain personality, and man was afraid of nature because there didn't seem to be anything he could do about it. It is only a fairly recent discovery that the complicated phenomenology of nature could be reduced in some cases to rather simple principles. So I do not understand why you say right off that this is something different. I do want to understand where it is different.

MURRAY: The basic structure of the family experience is importantly unvarying. Through the experience of the relationships between husband and wife, parents and children, and children

among themselves, this area of experience has a structure. It is common experience, whether you be a scientist or a Presbyterian minister or whatever.

RABI: But the person who does not have a father is outside your realm?

DOUGLAS: I visited some polyandric families up in northern India where the wife has many husbands and the children do not know who their fathers are—in fact, not just the children but none of the family.

HUTCHINS: How could you tell whether that was a good situation?

DOUGLAS: I like it myself.

HUTCHINS: I am sure you would not like it. Suppose you come back and you are representing the state of Washington in Congress and you introduce a bill to legalize polyandry because you think it is such an efficient operation in northern India. Or would you abstain from doing so only because it was contrary to the prevailing morals of the United States?

DOUGLAS: No, I wouldn't do either one. And I wouldn't in India try to proselytize against it, because of the peculiar function that it performs in that society.

HUTCHINS: Would you expect that over the course of the next several years—it might be a hundred—there might be a development in India that would eliminate this situation? Would you think that would result solely from economic and social changes, or would you think it would be possible to develop some kind of moral sense that might put an end to this practice?

DOUGLAS: I don't know. I think that the moral sense for the integrity of the polyandric system is very vital there. I don't think it would fit our society and our economy, but it exists in a place where the land is very poor and the food is very short and where the break-up of the estates through giving the land to the heirs is possible, and this keeps the family unit intact.

MURRAY: You are making, in other words, the same argument for it that Aristotle made for slavery. It is necessary under the circumstances, because you just can't run the railroad otherwise.

DOUGLAS: No, I don't say it is necessary in the circumstances, because you could disinherit all the children except the oldest son and adopt primogeniture, and they would go their own ways and end up in the cities working in factories.

HUTCHINS: Suppose you had been to India twenty-five years ago, and they showed you the caste system, and you came back here and described the caste system to us, and we asked you what you thought about it. You said, "Well, it is just there, and that is the way they run the railroad." Now, they are making a great effort, under the influence of something—whether it is the influence of natural law, Western pressure, economic interest, or whatever it is—to get rid of the caste system. The basis of the attack on the caste system is that it is unjust, which is in effect an extension of a word that Father Murray has used.

DOUGLAS: It is unjust in their sense and it is unjust in our sense.

HUTCHINS: As I understand it, natural law rests upon the proposition that there is something good for man as man. Man has a nature, and living in conformity with this nature is good for him and is the natural law. That is the place to begin. Now, if it turns out that man does not have the nature that we think he has, then we should stop talking about the natural law. But until it can be disproved, we are at present limited to the proposition that man has a nature and we are justified in assuming there is something good for that nature that we could call the natural law.

NIEBUHR: We really haven't raised in specific terms any of the vexatious questions which are involved here. Take birth control. In all theories of natural law you have the principle that natural law is what nature intends, and nature intends procreation. I say that is naturalistic, because it happens to be that man is not an animal and that his sexual relations, therefore, involve personal relations. You therefore can't say that nature intends procreation when nature may mean that the sexual relationship transcends procreation.

MURRAY: Let me say something first. I want to say in a most friendly fashion, Dr. Niebuhr, that nowhere do you reveal misunderstanding of natural law more than in the paragraphs you have written on the subject of birth control.

NIEBUHR: What is wrong with it?

MURRAY: Because your supposition is that my natural law theory immerses man in your order of nature, but that is not my order of nature. You like to make a distinction between nature and the self-transcending order of the self. When I speak of nature, I mean a nature that is particularized in the intelligent free self. You accuse my natural law theory of operating on a biological level in its argument against birth control, and this is radically false. This is not the way the argument goes.

NIEBUHR: What are the arguments then?

HUTCHINS: Could I ask you a question first? Suppose that the Catholics, and especially Father Murray, were wrong about birth control. Does this in your opinion shed any light at all on the validity or invalidity of natural law?

NIEBUHR: Just this: I would say that you have to be as empirical as possible. My theory, which is very heretical, is that the Catholic natural law theory as the basis of opposition to birth control is unrealistic. It is defending a theory in a Malthusian age where you have to consider all the relevant facts, the social facts, regarding the population explosion, etc. You can't simply take one fact and say it is the intention of nature, of God in nature, that we should have sexual relationships or cohabitation only for purposes of procreation, or something like that.

HUTCHINS: I would like to have an answer to my question.

NIEBUHR: I tried to answer it.

HUTCHINS: You are too erudite. All you have to say is yes or no. Suppose that the Catholics are all wrong about birth control. Does this invalidate natural law?

NIEBUHR: No, I wouldn't say that it invalidates it totally, but it invalidates that part of the natural law. If you define natural law as a law which states the ultimate conditions of human nature, common humanity, and so forth, birth control wouldn't come into that. I may be wrong about birth control, but I would say that my basic objection to natural law theory is that it is too specific. The more specific you become, the more you bring in historical contingencies, the more hazardous it becomes, because history moves on.

HUTCHINS: Your question is whether natural law really has any content that is of value in deciding the kinds of questions with which organized society and individuals have to deal. When Mr. Justice Douglas and I began to teach law thirty-five years ago, there were two ways, roughly, of looking at the material that we were supposed to be teaching. One was to use verbal coherence. It was not logical, because we didn't know any logic. This was a most unsatisfactory way of teaching law because, after all, it had no connection with reality. So we began to get interested in trying to find other ways of criticizing material, and we said, "Well, let us look at the results." Mr. Justice Douglas made a great reputation by looking at the results in commercial law, for example. This is very difficult to do; it is very complicated. Also it just takes you one step, because you have to find some way of criticizing the results.

If you say, how are we going to do it, you run up against the Justice Holmes way, which is that the will of the dominant group is the standard, and you can't take that, because the will of the dominant group might be wrong. You can't take the view of Learned Hand, who felt that the standard was adequate if legislation reflected the majority will or the prevailing mores of the community. You can't take Mr. Berle, in his latest incarnation at least, because he says the test of everything is the common habits of the people, and he explicitly says they might be wrong. I don't think you can even take the express words of the Constitution. You can't say that you are going to take your stand on the proposition that Congress shall make no law abridging freedom of speech, etc., because there are certain types of speech that Congress does make laws governing and, you would hold, should make laws; and the fact that it makes laws in regard to speech that you don't approve doesn't help you very much, because you are thrown back on the question: Well, is this my visceral reaction, or do we have any standard that will give me a guide?

So I have been trying to figure out for a long time what there was in natural law that would provide me with the kind of basis for criticism that I have been looking for. I am perfectly prepared to get over the historical problem. I am perfectly prepared to get over the cultural and anthropological and geographical differences, and over the differences in local or national traditions. Catholicism doesn't bother me at all. The fact that some people feel that the Catholics have been predominantly interested in natural law does

not lead me to the conclusion that the natural law is either good or bad. If religious faith, and specifically Catholic faith, is not necessary to a belief in and application of this doctrine, I don't see what the fact that the Catholics have been for it has to do with a non-Catholic's attitude toward it.

The reason that I don't have any trouble with history, the reason I don't have any trouble with cultural anthropology, is that, in the midst of all historic and geographic and cultural and anthropological changes, something common remains. We don't have any trouble in identifying men, and, if there is something common and if this can be called the nature of man, then you have a basis on which to begin to operate. My trouble is a totally different one. I try to think of poor old Mr. Justice Douglas sitting there in the Supreme Court with the rest of those learned gentlemen, asking themselves: What are the standards that I ought to apply to these cases? And I say to him, "Well, Bill, all you have to do is to put the natural law down on this." I think this becomes extremely difficult. In the process of getting rid of the history, getting rid of the cultural anthropology, and getting rid of religious faith, you may run the risk of losing the content and of diluting the natural law to the point where it becomes too vague to be useful.

What I am interested in is the connection between natural law and positive law and how natural law can operate as a guide to a standard for positive law today in the United States, or anywhere else for that matter. I agree with what Niebuhr and others have been saying, that one of our essential problems is to develop legal principles and jurisprudence that is not only good for us but also might be the basis of a legal world order.

DOUGLAS: The most recurring problem that we have in this field in the federal courts is the extent to which, if at all, one can secretly interrogate suspects whom the police pick up and hold incommunicado a day, two days, five days, a week. In Russia up to December 1958 it was the law that you could be held incommunicado for sixty-three days, and there was a committee of the bar of Russia that did something no bar association in America to my memory has ever done. They recommended a very radical reform —that every man, when he is arrested, is entitled to a lawyer so there would be no more secret interrogations. The answer of the Supreme Soviet was the back of the hand to the Russian lawyers, and they increased it from sixty-three days of secret detention to

six months. I mention this because it indicates that the ferment is working on another continent on this problem of human rights, human dignity. Here in California you are sitting in one of the states that has some of the most abusive practices in this field. I have taken the position myself—it is so violative of my sense of the dignity of man and the history of police practices—that a suspect is entitled to a lawyer when he asks for one when he is arrested. But that is not the law, and in California they can hold them forty-five days, five days, seven days, maybe not sixty-three days—nobody really knows. But that is the kind of projection, in a practical sense of the work-a-day world, of the things that we are talking about. What are your standards for that kind of situation?

HUTCHINS: Father Murray, could you take that case and show us briefly of what guidance natural law would be to the Justice?

MURRAY: First of all, I would very strongly maintain that what we understand by due process is a natural law principle. It is a procedure, a principle indeed, which forms the very substance of justice.

DOUGLAS: To a very great extent it is procedure, but it is not necessarily restricted to procedure.

MURRAY: But even as procedure it has a principle. The procedure is of the essence of justice, that justice must be done according to some form, and law must be applied according to form and executed in accordance thereto. Judgments must proceed in due form. These police processes which you have just mentioned are violative of due process, and they reveal at the very least an arbitrariness in the use of power. They are an abuse of power, and in violation of the forms of justice. This is a very clear illustration of the relevance of natural law. Now, mind you, I don't think the natural law, left to itself, could give a quantitative judgment here. Would it say, for instance, to hold a man incommunicado for two hours is violative of due process? Here you would have to make a human judgment of one sort or another—like beyond a certain point such as a full day and a night – and I should think you are then in a realm where violation of due process is visible.

DOUGLAS: I might just add this: One of the reasons I have been referring to India and some of these other countries in our discussions is because in India today their experience with the police

has been such that their appraisal of the rights of man, the dignity of man, respect for his privacy, has led them to say that no statement by a defendant to any policeman is even admissible in court. If the policeman wants to make the man talk and be able to use what he says as evidence, he has to take him before the judge or have him talk in a public place.

GORMAN: May I try to state what I take to be the implications of Father Murray's response? You are saying that some formulatable sense of justice can occur antecedent to the particular positive law, a sixty-three-day law or a five-day law; and that this sense of justice would furnish a proposition in terms of which you measure, though not with certitude, the rightness of a particular law. The proposition might be hard to formulate, but it would have something to do with the assertion of a human right to the highest possible amount of protection against arbitrariness in the use of official power. You would assert some such right before the court of reason as being true, quite apart from what the positive law may have to say on this point. Some of the positive laws could be reasonably judged not in conformity with this antecedent right.

MURRAY: Yes. The antecedent principle furnishes a judgment on the given law. Suppose there is no law on the books with regard to the treatment of apprehended people, people suspected of criminal offenses. Then your antecedent principle would guide you in formulating a law. The example you gave just a moment ago, Mr. Douglas, I would take to be entirely in conformity with the principle of justice that justice in society should be an open process, precisely because it goes on in society, and it therefore should be seen from the view of society rather than hidden from society.

DOUGLAS: That is quite a different approach from what takes place in our court. This is what I have referred to as the visceral application of law. Justice Holmes put it this way, not in an opinion, but in conversation: "Is the thing that happened to this man something that makes you puke?" Now, if it makes you puke, then it violates natural law and due process.

HUTCHINS: Some people have stronger stomachs than others.

DOUGLAS: That is why you get down to the question about the strength of the stomach. What was your background? Were you

ever chased by the police and fired on? If you were, you get one reaction. If you were born in a mansion on Fifth Avenue and never got beyond the confines of that society, then you have another reaction. There is not much reason to it. It is entirely personalized.

ASHMORE: There must be cases touching on this specific point of how long a prisoner may be held incommunicado. Have they ever established any coherent principle?

DOUGLAS: Each case is still open. There is no positive standard. In the Crocker case, here in California, they held him five days incommunicado and finally got the confession. The court held that it didn't make them puke. It didn't make five of them puke.

I will be glad to send you my dissenting opinion.

HOFFMAN: Aren't there two kinds of problems here? One is the existence of the power to hold a person for questioning without letting him have an attorney, or arraigning him. The other is the behavior of policemen who do this, whether or not the law prohibits it. In Los Angeles, as I understand it, you must take any person you have held before a judge within twenty-four hours of the time you picked him up.

DOUGLAS: Isn't it done?

HOFFMAN: I got a man out of jail after he had been in the place for nine days. They had moved him three times. They decided they did not want to make a charge against him, but then they had to think up something. At one point they tried to go back and falsify a record to show that they had taken him before somebody, or tried to. They hadn't done this, but as soon as we got a lawyer and as soon as the lawyer appeared before a judge, there wasn't any doubt that he could get out. They were holding him illegally, but they were continuing to hold him.

DOUGLAS: It is a problem of rather staggering proportions. We have in Washington, D. C. now, in the city itself, between 60,000 and 65,000 arrests every year that they call "arrests for interrogation." There is no charge. This is sheer suspicion. They are not the kind of people who sit around this table. They are not from the churches and the banks and the medical professions. They are the second- and third-class citizens. Last year there were 65,000 of them, which is rather appalling to me in a democratic society.

ASHMORE: Were those cases in which no charges were ever made?

DOUGLAS: No charges were ever made. They were held for a day or a week and then turned loose.

BURDICK: I have a question for Father Murray. Does the natural law speak with a consistent and clear voice to all people in all cultures? Let me give an example. In the Philippine Islands the people have a curious institution called *juramentado*. While under the influence of this, an individual gets more and more nervous and finally runs amok. Everyone can detect the symptoms—a kind of nervous tension and rolling of the eyes. When they observe this happening, they throw these people in jail, and when most of them recover they are very grateful, because if they go through with the action of *juramentado* they inevitably die in the process. In this case you would say imprisonment without a warrant would be a form of justice. Wouldn't the natural law speak in an even and consistent voice to all peoples and to all cultures?

MURRAY: On many things I would think, yes, but on other things, no. The problem here is one of refinement of the moral intelligence. I think I have mentioned the classic example which you find in St. Thomas. Highway robbery was not considered wrong by the Teutonic tribes, and this is one of the difficulties that he encounters in discussing natural law. Obviously, brigandage is not a morally acceptable way of making a living. It is a crime against society. But the perception of this truth requires a certain refinement of the moral intelligence, and the Teutonic tribes had not yet reached that level. What may be entirely clear to you may not be at all clear to me. I may have scales before my eyes and be unable to see, perhaps to your exasperation, what is absolutely clear to you.

BURDICK: Well, then, are the wellsprings of the natural law in the person regardless of the state of his society, or are they contingent upon the development of his society?

MURRAY: The radical dynamisms are present in human intelligence as such, in human reason. Their expedited use requires a certain education and requires a certain rectitude of will. You want to know what is morally right.

GORMAN: For the worry about the universality of natural law it is important to emphasize a distinction, a distinction required in any

case by a full exposition of the doctrine of natural law. The radical existence of natural law is in the dynamism of the whole human being, pressing, though not in a necessitating way, for conduct in accord with the nature, for conduct that will develop and complete it. It is only by reflection on experience of these natural tendencies or impulsions that natural law attains a secondary, derived mode of existence—as ethical and social norms posed by intelligence. Certainly as regards this second existence, in the form of expressed general insights about human happiness and human justice, natural law will have a varying, historical development. The articulation by intelligence, of what has been learned from human experience concerning the exigencies of human nature, will occur within concrete historical conditions.

But the real basis for the claim about the universality of natural law—and it is nothing if it is not universal in import—lies in the first kind of existence, in the dynamism of the fundamentally same human nature, persisting in force with the same directives, quite apart from the particular state of doctrine, of metaphysics, or of jurisprudence.

BURDICK: If this internal dynamism works the same way in all men, wouldn't you find that the outlines of the natural law in all cultures would be roughly the same?

GORMAN: I happen to think they are, contrary to what professional relativists and world-travelers would have us believe.

MURRAY: There may be certain outrageous exceptions like "Thou shall not kill anybody except your mother-in-law," but on the whole the notion of homicide is universally rejected, and so are the notions of theft and robbery and rape. The duty of paying reverence to your god or gods or your idols, if you will, the religious impulse, this you find. You will also find certain familial and domestic duties, certain of the mutual obligations of husband and wife, the duty of respect for the parent on the part of the child, the basic principles of justice. You may find variation, but the broad structure would appear to me to be the same. You would find, as St. Thomas said, that the human reason operates quite universally. Give or take a few men, give or take a few thousand men, the thing works. And the other things you cannot account for you can often trace back to cultural or tribal sources of another sort that are explicable.

GORMAN: More than that. There is a source, in fact consonant with, indeed part of, the natural law, for what might be wrongly taken as differences about the natural law. In the making of positive laws, other considerations enter beyond the need for regulation by the natural law or for conformity to it. It belongs to the artistry of positive law that there be an effective adaptation to the existing conditions and resources of the given society. Meeting this requirement produces differences in the operative codes of different societies and of the same society at different stages of its development. But such differences in the operative codes are not differences about the natural law. Indeed it follows from the natural law that it will require completion, as to determinacy and adaptation, by the artistry of the positive law.

NIEBUHR: I have a great appreciation of the idea of natural law when I realize the creative relationship that the Stoic natural law theories had to the genius of the Roman law. The Stoic natural law theories made it possible to overcome the relativities of the Roman Empire, but you also have to say immediately that there was a great danger. Cicero was one of the great espousers of it. On the one hand, he criticized the positive law because it did not correspond to the natural law, and, on the other hand, he simply identified the Roman Empire with historical universalism. So I would say that we have two layers, a bottom and a top layer. The top is the complete relativity in the realm of law, and the bottom layer is chaos in the realm of politics. The top layer has in it fanaticism, which I would define as attributing to a contingent moral value an ultimate and universal value. It is this concept that causes some of us to find ourselves in very pro-Catholic and anti-Catholic moods. When I realize how much Catholicism has done as against Protestantism by insisting that standards of justice cannot be equated with the positive law, I am pro-Catholic. Now, to come back to the Chairman's initial question: Is there anything about this thing that will contribute to a legal system for a world community? I say some.

HUTCHINS: Or even our community.

NIEBUHR: Yes, but I was going to compare them. I say that what you have is a layer of historical relativity. You have first got the positive law of our nation, and in this positive law of the nation there is included something of the natural law. It exceeds, more

than other law does, what you could call the minimal function of law, which can be defined as enforceability. Fortunately, we find that it is enforceable in most of America, except in the South, but on the whole a good question about positive law is: Is it enforceable? Mr. Justice Douglas has a great problem in the Supreme Court, but it is on the whole dealing with the positive law, the Constitution of our nation, plus the natural law. This is the second level, what Charles Curtis calls "the natural law of the nation" and what Adolf Berle calls "consensus." This is higher than the positive law. The Bill of Rights swings between the natural law of the nation and the positive law that you can easily enforce.

But then you have next in line the civilization, by which I mean Western civilization. After all, the Bill of Rights was conceived on the whole by the French Enlightenment rather than by the Anglo-Saxon tradition. We are part of Western democratic tradition, and that has its own natural law with various historical groups—medieval Catholic, and then the Enlightenment—and it is an interesting thing how the natural law pops up in the eighteenth century denying the natural law of the Middle Ages and affirming the natural law of Stoicism. Why? Because the natural law of Stoicism was equalitarian. This concept of equality was in the original natural law as St. Augustine conceived it. So you can't get rid of the historical relativity of these concepts.

And when you finally come to the whole world, you face relativity to the nth degree. If you are going to talk about a positive law for the world community, I think you will have to do it much as we do for our own pluralistic community and say that there are things about which we allow the debate to go on. I say the only positive law we have would be from the bottom to the top of natural law theories, namely, the dignity of man and the necessity for order.

HUTCHINS: Let me try you on a case. Let us take a great nonsectarian like Abraham Lincoln. The proposition is that all men are created equal, and yet you have slaves in this country. What does he do? He says that the natural law, to the effect that all men are created equal, is not part of the Constitution. It is not positive law. But it is true that natural law says that all men are created equal. This then should lead him to be an abolitionist, but he isn't an abolitionist. He takes his stand on the limitation of

slavery. Where we have a choice and where it is not dictated by our constitutional system, we are going to keep out slavery. But where slavery exists under the Constitution in the states already organized, it is not going to be tampered with. He says over and over again that he is not going to tamper with it. Now, I think this case not only has something to do with what you have just been talking about, but also has something to do with Father Murray's statements. It has something to do with the natural law and the consensus.

MURRAY: It suggests to me and to everybody, I presume, that nothing that natural law might dictate as right or wrong can get into positive legislation except by passing through the area of jurisprudence. Lincoln doubtless recognized what is a good natural law principle in jurisprudence: that, right or wrong, you could not abolish slavery overnight, that you had to do away with a great deal of opposition against it.

NIEBUHR: That wasn't a matter of consensus, because he had to fight down the South. Whatever your moral theory is, order is the first instinct of peace. So Lincoln's primary purpose was to save the Union, and the abolitionists were sore about it and in effect said the abolition of slavery was more important than order. What made Lincoln a hero for America, among other things, is that he expressed the survival impulse of a united nation. Whether or not it might have been a good thing to let the South go is not a moral question but a political one. You have to say that the idea of order is probably not ultimately normative, but it is practically normative for our community, and you have to say, what community, the national community, or some other community? I emphasize this because I think it will be important when we get a global community. I must say again that peace and order come first, even though what the Russians do might outrage our sense of justice just as what the South did outraged Lincoln.

HUTCHINS: You won't find any difference about that. May I display my erudition by quoting from St. Thomas? He says you may revolt if there is no other way out, but only if you succeed. If you can't succeed, then the only recourse is prayer.

GORMAN: It is important to me, however, to say that this interest in order is an interest in an element of justice, not, as Dr. Niebuhr seems to be saying, an interest in something antithetical to justice.

NIEBUHR: No. I am not antithetical to justice. I say that in the chronology of justice order comes first. Everybody has said that from Plato on down.

GORMAN: Circumstances can make it right to work for one element of justice, seemingly prerequired for the later realization of another, more important element.

MURRAY: You can talk about order as an abstraction, or you can talk about particular types and kinds of order. I like to talk about "the ordering" in the matter of society. It is a precept of natural law that society should be ordered, that a process of ordering should always be going on, because the society requires very many kinds of orders to continue its constant improvement. Through this process it is possible to make corrections, and so on.

COGLEY: It seems to me that we have been talking about three faces of natural law. I believe that everyone tends to operate according to natural law principles when he tries to find the answer to a personal moral question. There is my first face of natural law. The second would be concerned with national law, and the third with international law. I would like to ask this question: As far as the national scene is concerned, is the natural law supposed to be helpful to the lawmaker and those who interpret the law, or is it to be helpful to the law enforcer, or is it to be helpful to both, and how? The same question may be asked in regard to the international scene. Would it be helpful to some international law-maker or enforcer, or to those who interpret international law?

HUTCHINS: I would assume that the natural law should do all of the things that you have indicated. Its claim is that it can illuminate us in all these respects.

COGLEY: But my question is how?

MURRAY: Could I rephrase the question? The question that confronts the city is: What is the city to do? The famous Macedonian question. The first thing you have to know about a city is that it isn't an individual human being. You accept this as a statement of the question. Now I will answer it. This question, what is the city to do, has to be answered by everybody in the city with a distribution of proportional responsibility of the law-maker, the citizenry, and so on, right down the line, each according to his competence and responsibility.

COGLEY: Suppose I were a policeman and it was law that a man could be held sixty-three days. Would I be obliged to operate according to the natural law, which I take it would not countenance holding a prisoner for questioning that long, or would it be my obligation to follow the positive law of the place?

MURRAY: This gets us back onto the whole range of problems of a conflict of duties. As a policeman, indeed I am the servant and instrument of the law. As a human being, I may say that this law ought not to be, and I am caught in the conflict.

DOUGLAS: The law may have the power to hold a man this long, but you may decide that the decent thing is not to do so.

GORMAN: I don't see that it is such a tough question as a question, though an actual resolution of the conflict would be made by the individual person for reasons that he couldn't fully expose to himself rationally. If he feels the conflicts intensely, then his sense of justice in accordance with the natural law is relevant, and this is where Holmes' puking point becomes important. If his sense of justice is so violated by this sixty-three-day law, he not only resigns from office but determines to act politically in order to get this bad law, not in conformity with the natural law, changed. Our example may not be fortunate; it may not be plausible to imagine a policeman with Antigone's moral sensibility. But the question is the same. An appeal to the superior validity of a law prior to the bad positive law lies open.

MURRAY: Let me take another crack at answering Cogley's question: What is the city to do? Our society must first understand the nature of law. This is what makes our people civilized, that they do understand the nature of law itself antecedent to any legal structure, constitutional or statutory. This is the primary understanding that the city must achieve. Otherwise it is not by definition civilized. Now, this is where natural law illuminates the nature of positive law. It illuminates the differential character of law and morals. It implements the procedure that must be followed through. It tells you about the scope and limitations of law. There are certain things you can do by law, and there are certain things you can't and shouldn't try to. It eliminates fanaticism to some extent, because a mark of the fanatic, of the reformer, is that he says because a thing is right it ought to be done and let's get a law to do it. This is an excessive use of the instrumentality of law for

the improvement of public morals. Natural law tells you that the purpose of the legal system of society is to establish minimal conditions of morality which will keep the whole social enterprise from falling apart. This is all law can do. The rest is left to the dynamisms of virtue in the individuals in the voluntary associations, the church, and so on. The aims of law are always minimal. This is the sort of understanding our city, in order to be a proper city and a civilized entity, should have. If this idea of law falls into decadence, then the city, it seems to me, is on its way to barbarism. Law then becomes sheer power, and the courts are likely to become hardly better than policemen. They are simply going to be instruments of coercion of some sort or other.

MILLIS: Cogley's question was in three parts. He also included the world problem, rather than just the problem of our city and the problem of the individual. It is impossible for me to see how natural law can be applied to the international problem. Does it say anything of relevance to us?

MURRAY: The greatest things were said in the days of Vitoria, the sixteenth century Spanish theologian; that is, you have to recognize the international community as not being a community in the same sense that the nation or the national community is. Consequently, the type of unity towards which you aspire in the international community is far less coherent, far looser, than the type of unity or the political ordering that you aspire to at a national level.

DOUGLAS: But you do have an international court with issues comparable to the kinds of issues you have here in Santa Barbara.

HUTCHINS: It was on the basis of natural law that Vitoria condemned the conquest of South America by Spain.

MILLIS: We have the practical situation here where there is a desperate need of the introduction of order as a part of justice in the international world. Does natural law offer us any means of furthering that end?

MURRAY: You would have two problems, would you not? You would have the problem of the construction of a legal system that would govern the international life and the relationships between the states. You would also have, correlatively, the problem of an international consensus which would make this international legal

system possible, in St. Thomas's sense, or enforceable and workable. You might say that if a group of jurists got together, they could draw up some sort of constitutional arrangement that would govern international relationships and they could do it on the basis of the legal and jurisprudential principles of natural law. The trouble is that this would be a paper document to a large extent, I am afraid, because it might or might not, in various of its provisions and enactments, correspond to the conscience, let us call it, of the international community at the present moment.

NIEBUHR: It would be a paper document as a positive law, but isn't it true to say that one of the great validities of the general principle of natural law is what you said before? It always reaches a more ultimate community and is therefore critical of the parochial community.

MILLIS: You could see that the doctrine of natural law might be a means or a vehicle toward the recreation of this minimum consensus which is apparently necessary to institute international order, but on the other hand I haven't seen how it would work, because, so far as I can see, the Russians, let us say, use most of the concepts that I would ascribe to natural law but give them a different interpretation, and nothing that has been said has shown me how you can reconcile the two interpretations. I can imagine the Russians ultimately referring to what I would consider the opposite of natural law; that is, the Russians would hold a man sixty-three days and would say that this was in keeping with the natural law principle of the dignity of man, the dignity of the Russian man, and that this dignity could not be maintained unless you were able to hold men for sixty-three days, because these men are subversives.

MURRAY: I think that a case could not be made effectively that it is somehow a requirement of the dignity of man that he could be held sixty-three days.

MILLIS: I do not think it could be refuted effectively to a Russian audience, and I don't see how a non-Russian audience could refute it. Russia refers to the security of the Russian state as being necessary in order to maintain the dignity of man. They base the argument on this.

NIEBUHR: They would say that the security of the Russian state

was necessary to establish a universal community, to use their Messianic terms, not the dignity of the individual.

MILLIS: What justification have they for the establishment of the international community if not for the dignity of man? They are bringing about democratic centralism on behalf of the dignity of man.

MURRAY: This question always recurs: Is this a reasonable way of protecting society? There is no doubt of the right of society to protection, but you have to call into judgment the procedures invoked for the protection of society. One of the questions which arises when one tries to cope with your problem, Mr. Millis, is that you have to mount the whole ideological argument against communism as an ideology, as a state, as a power system, and it would be an enormously complicated thing.

MILLIS: I don't want to make the argument. I merely wonder whether in the doctrine of natural law there is any way of answering it.

MURRAY: Yes, I think there is. I think it is quite possible to mount an intellectually convincing argument that the Communist belief that the state has dominance over and is more important than the individual is false. I am not saying that you could make Mr. Khrushchev accept the validity of this argument.

MILLIS: If you can't, then we can't create the consensus that is necessary.

NIEBUHR: Wouldn't that point to the fact that you can't rationally gain the consensus but that historical forces establish the minimal basis for consensus? In other words, we aren't going to establish a universal consensus by convincing the Russians that our community is right and their community is wrong. We can only establish this consensus by arousing the collective survival impulses of our community and the Russian community, and then perhaps there would be enough interchange between the two communities that ultimately some kind of consensus would be established.

GOLDMAN: All I want to do, and I am sure it is a futile effort, is to put this business of natural law in what I consider its proper perspective. It has been discussed around here by many of us as

if it has some inherent validity, and I would assert that it has no inherent validity. One assumes that, if there is such a thing as an inherent sense of natural law, one would find in the 5,000 years that we have known anything about human beings that they would reveal some inherent sense of it. I find no inherent sense of it, much less an addiction to it, much less practice of it, much less recognition of it as opposed to many other ways of thinking. Father Murray counters to that that all people have a sense of natural law, but they just don't know it yet. This is no longer an appeal to experience. It is an appeal to a kind of prediction which is undemonstrable. This kind of theory is simply theory and no more valid than any one of a number of other theories.

Now, if that be true, why don't I want to adopt this theory anyhow? I would say simply that there is inherent in this theory an assumption that it represents final truth, that it represents something that ought to be practiced across the board as a moral order by people who totally agree that this is truth. I would say, insofar as we have countries where men have professed to live by such a natural law, that these are countries where neither I nor, I suspect, anybody else around this table would like to live. Well, then, Father Murray says, these countries don't really understand natural law. They are not really practicing it. They are just using the words. And I say to myself, let us put natural law in its finest form at work in America. Let's pick our friend Father Murray and say, "Here is the natural law; you tell us how to judge the public questions and tell us what we should do." Well, for example, according to his natural law, communism is evil, an absolute moral evil. I will suggest that communism, despite its tremendous element of evil, has brought a good deal of good in social and economic terms and in helping to force our country to do some things which it should have done a long time ago, namely, to do something about the Negro. The point is that when we put this theory to work attitudes and actions inevitably result from which I for one want freedom. And so I recoil from it with a plea for the chinks and the interstices, for a more flexible way of thinking.

MURRAY: Take the illustration that we have used here. Would you agree that if the dictates of natural law were made operative in all the police departments in the United States the result would be rather good?

GOLDMAN: If you defined the natural law.

MURRAY: It has been defined in the conversation between Mr. Douglas and me. Natural law is the theory of due process.

GOLDMAN: Having heard your definition of natural law as applied to the police situation, I would say that it would be good, but I do not know what your definition of natural law would be when applied to a number of other things.

MURRAY: Let us go down the line of any issues you care to raise. We have raised the police department.

GOLDMAN: Russia.

MURRAY: You are objecting to the fact that the natural law, after all, is the thing that is at the root of the cold war. If we didn't have the natural law, there would be no cold war.

GOLDMAN: I think your interpretation of the natural law is an appeal to the cold war.

MURRAY: I think this is true.

GOLDMAN: It has to be.

MURRAY: The natural law foundation of the American constitutional system brings it into conflict with the total power system of Russia.

GOLDMAN: I don't believe that is entirely accurate. I don't want to believe that it is. I don't want a philosophical theory that brings, inevitably, such dangerous results.

HUTCHINS: Suppose you were to resort simply to American tradition and talk about freedom and talk about individual rights. Suppose you ask yourself then whether in the light of this tradition, the American tradition, Russia represented the kind of country that we thought we would like to see everywhere in the world. Leave natural law out of it for the moment and ask yourself what you think about the state of freedom in Russia and whether it is one you would like to have extended.

DOUGLAS: I look at it a little bit differently. No matter how debased a government may be, it cannot erase the diversity and vitality in people, whether it is Russia, Spain, America, or whatever the country. Therefore, this establishes for all people throughout the world a common denominator, or an approach for the interchange of

ideas. That is the great contribution in the development of natural law, so that we can reach even inside Russia. There are bar associations and scientists there who feel just as we do, but who are pressed down.

GOLDMAN: As I understand what you are saying, your natural law is quite different from Father Murray's natural law.

HUTCHINS: Father Murray, would you admit that your natural law is quite different from that of Justice Douglas?

MURRAY: I think if Justice Douglas and I were to take a series of cases that were presented for judgment in court we would find ourselves agreeing on the concrete applications of what I call natural law principles, although he might not like to call them that as such, because I gather that this is not his philosophy. He is like me in fragments like due process. I say this is natural law. I don't know what he says.

DOUGLAS: I am not rejecting it.

GOLDMAN: Mr. Douglas's definition of natural law seems to me to be equated with human needs and aspirations as against any formal theory. It is an outgrowth of the Progressive movement and of a lot of things that came before in actual experience. I think this can be called natural law, but I do not think it is a statement of absolute, inherent truth regarding the law.

MURRAY: I think the law should be reasonable, and it should conform to reason.

DOUGLAS: Might it not be worthwhile to put it this way: That the laws could not be said to be unreasonable. In view of the variety of views about minimum wages, maximum hours of work, factory conditions, traffic affairs, police practices, and so on, shouldn't there be at least the concession that it is not what the judge or the lawmaker would think reasonable but whether the restraint or the requirement might be deemed by some group in a consensus to be reasonable? In other words, that it would not be unreasonable by some community standard.

MURRAY: Yes, I would accept that. I think certain things could be specified as unreasonable. I recognize the difficulty in applying the canon of reason, because in any issue that comes before the law you are dealing with a practical judgment and inevitably there

are diversities. The judgment of each man is made, as you suggest, out of his own personal experience, his own mind, his own background, education, and everything else. Moreover, in the nature of the cases that come before the law I should think that a variety of practical judgments might all qualify as reasonable in the circumstances, whereas if you take the negative canon I think we would be better on judicial grounds. Certain things would be qualified rather widely as unreasonable and violative of what an ordinary man would consider to be the reasonable thing. Could I just add that this issue of the application of the canon of reason was raised when we discussed who are "the wise and the honest"? Special competence, acquaintance with the facts, an intellectual and a moral element—all these qualities are in the "wise and honest men" who can come up with a canon or a standard that would be embodied in the public consensus.

MILLER: It appears to me that in practically all of the cases, the ones that we have mentioned and others we have not, we are confronted with multiple and conflicting principles. Isn't this the structure of our problem, multiple and conflicting moral claims? Is there not a tendency in natural law thought not to relate one moral aspect of the situation to another: Slavery is a violation of the natural law, but how do you relate it to the preservation of the Union? The tendency of the natural law is toward a kind of moralism that fastens onto certain moral claims, leaving out others that do not easily connect with what is reasonably human. I wonder if natural law really helps when the problem is the *proportion* of: How much do you press for preservation of the Union, how much do you press for elimination of slavery? How much does natural law hurt rather than help in emphasizing one side and creating fanaticism and imbalance?

MURRAY: Certainly I wouldn't think a tendency to over-moralize, much less to over-weight one particular moral fact in one particular situation, is at all a tendency of the mind of the natural law jurist. If he is true to his own theory, he is obliged to reckon with all the moral facts that enter into the situation. I think you are quite right in saying that most of the practical problems which arise are complicated by conflicts of duties, or value, if you will. Consequently, he is obliged to reckon with them all. He would get some guidance from his own theory. As a matter of fact, the theory does set up some sort of hierarchy of values that would assist him in judging

complicated situations. The example of the Civil War is a difficult one, because it would be awfully hard for me to establish—and I wonder if I would even undertake to establish—that the preservation of the Union as such, the retention of the Confederacy in the Union, was a dictate of the natural law. I don't think it was.

HUTCHINS: Take a more difficult one. Take the police chief of Los Angeles who is the principal opponent of the anti-wire tapping bill known as the Cahan Rule, which has just been adopted by the Supreme Court of California. The Chief of Police of Los Angeles takes the position that this rule makes the enforcement of the law, that is, doing justice in, say, a case of narcotics pushers, impossible. Suppose you accept that as a fact. Then what?

MILLER: I think he has a harder time arguing from the natural law than the man who is opposing him; that is, the man who is gripped by the moral content of a situation. I think the protection of the Union and the protection of such moral content as the culture has achieved are inadequate. What is harder to judge in natural law terms than the abstract argument about human values is a situation where you have a contention; then the natural law theory tends toward an imbalance in the struggle.

FERRY: What do the words "abstract argument about human values" mean here?

MILLER: It is easier to argue against slavery in terms of natural law theory than it is to argue about the preservation of the Union in natural law terms. Although slavery was a bad thing, Lincoln also wanted to preserve the Union. The natural law wants to relate all of the elements of the moral situation too quickly and directly to what is basically human and reasonable.

ASHMORE: I would like to go back to the statement that the natural law would not have required Lincoln to attempt to preserve the Union. I can't agree, because if he was trying to prevent slavery and if he had permitted the South to secede, that would have been a way of maintaining slavery. The only way to end slavery was to preserve the Union and either negotiate slavery right out of the situation, or, as it turned out, the only thing to do was to send troops there. I don't see that he could have avoided any principles of natural law and said that they had a right to secede and then washed his hands of the problem.

MURRAY: He might in some indirect fashion have been bound by the natural law. If it be true to say that this moral objective, the freeing of the slaves, could only be accomplished through the preservation of the Union, then the preservation of the Union becomes necessary and obligatory in the end. But it is only the end that is prescribed by natural law. It is a pure matter of history that our fathers brought forth on this continent one nation.

ASHMORE: I think this is the nature of the complexity that you get into with all these questions. But if we assume that Lincoln wanted to end slavery and that this is what the natural law required him to do, then he would have avoided the problem and he would have let the South secede. But he preserved the Union and so he could end slavery and preserve the Union too.

NIEBUHR: Could I put this question in terms of Aristotle? He put a great emphasis on the hazardous character of applying principles; the farther we get from principles, the more hazardous is the application. As I understand it, though, the appeal is not to ultimate principles but to medial principles or proximate principles. Aren't they in the same category as the application in the Lincoln case? There is no good way of determining whether Lincoln was right or wrong in preferring the Union against saying "I want to abolish slavery at all costs." There is no way of saying that in terms of any rational principle without surveying all the contingent aspects, and when you survey them you do it without actually knowing the consequences and therefore you make a hazardous decision.

MURRAY: Take it backwards to the conclusion that you reach at the end of your survey of particular situations, and let us say that the Civil War turned on a practical judgment, whose primary virtue was prudence. A judgment that was prudent at the moment can later turn out to have been mistaken. Antecedent to making it, you make as best you can a prognosis of its consequences, but the consequences of any human action are always to a large extent unforeseeable, because the decision gets prolonged into this world of contingency.

NIEBUHR: I accept that.

MURRAY: Hence, your intentions may be defeated by the event. Consequently, you are bound to foresee as best you can the consequences, although you know at the same time that you can't.

Nonetheless, the judgment, as made under present knowledge, qualifies as prudent, and therefore has the highest moral quality or value that it can aspire to. Lincoln conceived that the preservation of the Union was a necessary means toward the abolition of slavery. He may have been wrong. Without the Civil War the abolition of slavery might have taken a little more time. Perhaps in the end it might have been accomplished more humanely without the whole Reconstruction Era. Who is to say?

HUTCHINS: In an effort to extract the utmost advice and criticism for my selfish purposes, I would like to revert to my paper, the last part of which has not been much referred to. It deals with law, jurisprudence, and technology. The charge is that Austinian jurisprudence, which it is alleged still prevails in this country and in England and in Australia, and which holds that law is the command of the sovereign, is inadequate in the following respects: It creates misonomy, a hatred of the law, because it permits a conception of the law as coercion or a fabrication of political deals; it makes law unavailable as a source of legitimacy for organizations or groups seeking legitimacy; it neglects the pedagogical function of the law; it makes law unavailable as a rallying point of humanity; it creates a special confusion about administrative law since it does not offer any rational basis for guidance and control of bureaucracy; and it is incapable of coping with the new problem, which is the problem of the oversight of technology.

It is suggested that at that point the two faces of federalism merge into one, because individual liberty can hardly cope with technology, and political liberty, if law is simply brute power, cannot cope with it either. This suggests that principles of jurisprudence, that is, general legal principles, need to be developed and carved out, which leads us back to natural law, to Eric Goldman, and to the question whether there is any value in this search, and why we should try to discover legal principles; whether there are any legal principles and whether they would, if discovered, have any utility in practice for judges and legislators who are trying to decide what the political community ought to do.

The question, for example: Is torture wrong? A lot of people in this country and in England think it is, and some people in France think it is, but apparently not enough in France. I suppose the majority of the people of the world and the majority of the

legal systems employ torture today. We think it is wrong. Well, is this a local parochial prejudice, or is it a principle that we could hope, with increasing knowledge of human nature and of the natural law, might be extended throughout the world?

NIEBUHR: When you say that jurisprudence is related to natural law, you are saying that it deals not only with law but with the relationship of morals to law. Is that right?

MURRAY: If you are not concerned about the relationship between morality and the order of law, there is no great reason why you should bother about jurisprudence, because this is the necessity of jurisprudence, it seems to me, that it is postulated by the fact that you are trying to bring two orders into some sort of reasonable relation.

BUCHANAN: Aren't you both settling too quickly the distinction between morals and law, which is exactly the problem with jurisprudence? If you had a good jurisprudence, you wouldn't be making this distinction.

MURRAY: No. I think you make a call for a jurisprudence in the second instance because you are confronted with the problem of transposing moral principles into legal enactments, and these two orders of life and action are differential in character. They do not cover one another.

BUCHANAN: It seems to me that there could be a theory of natural law or some other legal theory that would not talk about trying to translate morals into law and would itself competently deal with such things as torture or the technological system.

HUTCHINS: Are you suggesting that the sphere of the moral and of the legal is identical?

BUCHANAN: No, I didn't mean that at all. It sounded that way. It seems to me they are quite separate, but to say anything outside of Austinian jurisprudence is moral seems to me to be begging the question. If you had a good system of law, it might cover much more than Austin does. It might take in what we now consider to be morality, but it would actually be a technical part of jurisprudence.

HUTCHINS: Aquinas viewed law as an ordinance of reason directed to the common good, with various other qualifications attached

to it. This meant that if there was something passed by the legislature, commanded by the sovereign, that was not an ordinance of reason and not directed to the common good, it was not law. It was something that was going on, and you might have to obey, but you did not call it law. You did not even say it was a bad law. You said it was no law at all. Is that what you are saying?

BUCHANAN: Yes, very much. At least law is directed to the common good, and not to the whole of the moral realm.

MURRAY: Is it not true to say that the question of the nature of law, what is law, is not properly a technical and legal problem? It is a problem in moral philosophy.

BUCHANAN: I was trying to ask: Do we want to take all of morality into the law?

MURRAY: No. That is what is implied by the differential character of morals and laws.

BUCHANAN: There is what you might call a political morality that comes under the common good; that is, if you define the common good in any sharp way at all, this will define the kind of morality that you want law to consider. You don't want to consider all morality if you are looking for jurisprudence. You want only what is relevant and good for the law.

MURRAY: You still wouldn't aspire to enact all of it. Your enactments must be necessary, or at least useful.

NIEBUHR: Mr. Chairman, you asked whether jurisprudence was particularly important in the technical complexities of our age. Firmly as I believe that there is a moral climate in which legal enactments take place, I would rather think that you would take the line that the more complex a society becomes, the less the moral issue is raised if there are the proper moral presuppositions about justice, because things get more and more technical, and the less confidence we have. All our decisions are decisions in which you put your emphasis on one thing or another, on one value or the other. They are not clear moral decisions. They have to have a lot of empirical detail, because when you make a decision you are dealing with values that are in tension with one another.

MURRAY: This is important, this relationship between general principles and the empirical details contained always in the solu-

tion to some practical problem. In any given situation the general principle remains the norm of judgment upon a technical solution, but you might have a number of technical solutions all of which would be equally acceptable or morally equal from the standpoint of jurisprudence.

HUTCHINS: Let us take this torture business and think about the empirical details. I will make a case for torture. I think you can do so very easily. It is a way of getting at truth. It is a way of maintaining civil order. It is a way of discovering those whose souls would otherwise be damned. I suggest also that you could make a pretty fair argument for child labor in the nineteenth century, full of empirical detail. Now, what I want to make clear is that this paper of mine does not suggest what the principles of jurisprudence are, but it suggests that it is extremely important to argue about them, and to argue about them on a basis that assumes that these principles, if they can be discovered, are important.

We would all admit, wouldn't we, that there are large legal areas in which all that is required is that you know the rules? For example, it makes no difference if you drive on the left or on the right so long as everybody knows the rule and follows it. Whole sections of commercial law consist of sets of rules under which businesses are to be run if people are to know what they are to be responsible for. It doesn't make much difference what the consideration in contracts is, but you have to have consideration. However, we are concerned with more difficult cases, and the question is whether natural law in the formulation that has been presented here can be of any help.

GOLDMAN: If you have to answer the basic question, would it not be appropriate to get back to an attempt to apply the natural law to some specific national problem at present?

ASHMORE: How about the use of the power of the state to prevent, limit, and control the dissemination of contraceptive information or material? Is this an issue, or isn't it?

MURRAY: Yes, it is a good issue.

GOLDMAN: Yes.

HUTCHINS: Is there any disagreement?

HOFFMAN: Is there anybody who thinks the power of the state should prevent this?

COGLEY: The issue is whether the powers of the state should be used for or against contraception.

MURRAY: It would be a difficult argument to make. Norman St. John-Stevas has brought the problems out very well in the pamphlet the Center has published. You start, for instance, with the facts, the primary fact I suppose being the enormous size of the contraceptive industry at the moment. You have to acquire some data as to who in general uses these things. I doubt if anyone around this table would make the case for contraception as a means of making teen-age promiscuity safe. Anyone with a moral conscience, at least, would like to see teen-age promiscuity reduced to some minimum, if possible. Then you would inquire under the coercive instrument of law what the law, with some probability of success and with due regard to other values, might do about what is a moral evil in society. I presume widespread promiscuity would be regarded in society as not being without social effects, as well as effects that a moralist would consider damaging to the individual. You go around checking all these bits of information, and, if you are operating within the natural law theory, you make as wise a prognosis as you can of the effects of legislation directed, let us say, at the industry, and another type of legislation that would try to do something about the drugstores. You have to find out how these things would be likely to work, whether they would be endorsed, whether the legislation would be possible.

One of the values of natural law theory is not that it gives you a ready-made set of principles that you can pull down from heaven but that it provides you with a mode of jurisprudential thought and legal thought with which to attack whatever the practical problem is. I don't know what the particular solution would be in this matter of contraceptives. Part of the prior inquiry would be into the general state of the moral conscience of the community at the moment. What does the community consider wrong? I suppose you would have to say today that the bulk of the American community does not consider the use of contraceptives wrong. What is the level of the popular conscience? Is there some consensus, for instance, presently operating in the United States that the contraceptive industry is contributing to the corruption of the morals of minors, who in a special way are the wards of the law?

This is the way I would go about it as a natural law jurist. I haven't got any cut-and-dried information about birth control as a matter of policy. I myself hold the view that artificial contraception is morally wrong, but this does not settle the legal question at all. We have to do a lot of thinking.

BURDICK: Your approach is so generous and so eclectic that I don't see where there is any natural law content.

MURRAY: Oh, yes, because I am attacking the problem from the standpoint of the natural law.

MILLER: You derive from natural law the proposition that contraception is morally wrong.

MURRAY: I get the impression – correct me if I am wrong – that there are those who think that if you hold a system of natural law you are committed to an excessive moralization of social and political and economic life and that you introduce into the political order what they might consider an excessive amount of coercion. In other words, you will have a highly regulated and unfree society. I think this is false. There are correctives within natural law theory on this precise problem, and it estimates very precisely, I think, the value and limits of coercion.

MILLER: I don't charge natural law with a leap to coercion and authority. I don't know whether the moralization of the political questions quite describes what it is one feels. That is part of it. It is a rational morality by definition, and one still feels, despite your disclaimer, a certain deductive element in this problem of birth control. I feel a movement from an abstract picture of the human situation to a precept of natural law, which then enters into our calculations about what we should do in public policy and seems to me to overweight some elements of the moral and political situation as against others.

MURRAY: That would be an issue that we would have to debate in terms of the arguments. My argument leads to the conclusion that the act of sexual intercourse performed by the use of contraception is not an act of love, and you would say, "You can't prove that." Then we have a philosophical question to argue.

MILLER: I think that my understanding of the nature of man would include some other element than procreation.

MURRAY: Then you have to point out to me, which I don't think you could, that in constructing my argument I am somehow leaving out some aspect of human nature. My argument is based on the fact that I include all the elements.

GOLDMAN: What is natural law but just one among competing theories for providing an approach to public policies?

MURRAY: What you ask in effect is: Is there any such thing as Reason with a capital R, or just a lot of little reasons? I think there is a just distinction between them, and I would maintain that the canon of reasonableness is Reason with a capital R.

GOLDMAN: Which should bring us both out in the same place with regard, say, to providing bus service for parochial schools.

MURRAY: I am not saying that it will.

HUTCHINS: I would suggest that your position, Mr. Goldman, leads you to the point where you can't argue. What you are saying is, "Well, I have my prejudices and Father Murray has his."

GOLDMAN: Therefore, you have the play of forces.

HUTCHINS: But you can't argue about the play of forces. You can't argue about prejudice. All Father Murray says is that if you have a judicial decision, either past, present, or future, you may argue about it in order to come to some intelligible rules. I do not believe anybody can say that he knows absolutely whether his decision in a political matter is correct and that there is no other argument that can be advanced. Certainly, by the time a case has got to the Supreme Court of the United States, many intelligent people have expressed themselves on both sides of the argument. So I do not see how any natural lawyer can argue that he has finished the argument when he has reached his conclusion. To say that there is Reason with a capital R only means that the argument may go on. The point of difference, then, is that when you say, Mr. Goldman, that your cultural background, as translated by you, leads you to a certain conclusion – and there can't be any real argument with your cultural background—the thing is over and you are remitted to Learned Hand's position that the prevailing mores determine the law. There is no basis for this except a statistical one.

BUCHANAN: I would like to add one thing. If I understand the relation between Reason with a big capital R and reason with a

little r, the big R is very prolific in producing little r's, as well as the consensus.

MURRAY: And vice versa.

BUCHANAN: Yes, these are in the nature of reason. It has a possibility of consensus. It also has a possibility of "dissensus" of a very sharp and perhaps long-standing kind. In other words, the argument Hutchins is talking about can be infinite.

COGLEY: I would grant to Mr. Goldman that the social, political, and economic forces at work on an individual would strongly influence his use of reason and may even corrupt its judgments.

HUTCHINS: Absolutely, with a capital A.

COGLEY: I don't want to deny that economic, social, and political influences are at work. All I want him to do is to agree that the story doesn't end there.

GOLDMAN: Which story? You see, there are two stories here.

COGLEY: I am saying this: When I sit here and you sit there, there are anti-rational forces of all kinds operating upon us. It is my belief that we can eliminate some of them by an act of intellect and an act of will. With some of them we are not wholly free creatures, but if we are the complete playthings of these forces there is no point in your sitting there and my sitting here and our having this discussion.

GOLDMAN: I want to try to make clear what I am saying about natural law. What I am trying to say is that as a guide to the good society it offers either too little or too much. If it is simply a doctrine of "Let's try to be reasonable," I have no protest. Of course, let us use reason, although I don't want to use reason exclusively instead of viscera. Sometimes I trust viscera rather than reason. But I repeat—if it is just an appeal for the use of reason, then it is too little. It is no different from any one of many such appeals.

I don't really believe it is simply that. I believe it is too much, in the sense that you are using reason to reflect on experience and then arriving at a decision about the nature of reality and the nature of man, and deducing from this decision the answer to some great questions of public policy. You not only get your answer but insist that all wise and just men who will apply reason

to experience will get the same guidance. I say that is too much, and for two reasons: One, it is not demonstrable; two, it brings about a dangerously unitary conclusion.

MURRAY: In other words, you wouldn't like the kind of world which is fashioned by public consensus, which is fashioned by natural law theory. If it will comfort you, you are never likely to get this kind of world.

GOLDMAN: I don't want it if I could get it. You are asking me to join something that I don't want to go along with. I cannot accept your philosophy as anything except one philosophy among many others. It is no more reasonable and no less reasonable than others. As to whether my philosophy is simply the majority will, whether the play of forces leads simply to the majority will, I say that it leads to many kinds of shifting circumstances in which you get majorities or minorities in control for a while, because a human being is a part of many different majorities and of many different minorities.

MILLIS: I want to come to the defense of what I think Goldman's position is. If we adopt Reason with a capital R, all I understood of this was that it permits you to realize that what seems to you reasonable may seem to another person to be unreasonable. In this case, the proper thing to do is argue, and so you engage in the argument. But I never got any sense from this discussion here that the other person wouldn't ultimately have to lose the argument and that you would win. You must always win the argument in the end, because you have truth.

MURRAY: No, it depends on what the issue is and the argument. If the issue is the kind of question that comes up for a legal decision, then it is a matter for practical judgment. Let us take the case of the international community. Suppose I say that in an international community ruled by natural law and supported by an international public consensus there would be several limitations placed on national sovereignty. Would you think this is a good thing or a bad thing?

GOLDMAN: I think it would be good, but what has it to do with natural law?

MURRAY: I would say that natural law would call for limitations on national sovereignty. You have put the issue that my theory

would be bad for the world and that my theory is never going to make the world into the republic of wisdom. The community is a jungle very largely because of unlimited national sovereignty, not with regard to war but with regard to the unlimited right to war as an attribute of national sovereignty. What natural law calls for is the juridical organization of the international community on the analogous model of the national community. There would have to be an order of rights, proper tribunals of justice, and some sort of political authority that would rule not people but nations, and there would therefore be subordinate national sovereignties. This kind of world would not be the jungle we have now.

GOLDMAN: I agree that if you were the man to apply natural law to public policies, I would probably be happy with many of the results.

MURRAY: He is speaking for the capital R.

GOLDMAN: What I am objecting to is a system of thinking that says that there is one set of basic principles determined by reason from which certain decisions inevitably flow. Suppose you are not interpreting that basic set of principles, but somebody else is. This is why I view this as a fearsome doctrine or as a doctrine leading to fearsome consequences.

MURRAY: Then you are against philosophy.

GOLDMAN: No, just *that* philosophy.

MURRAY: The general argument against me seems to run this way: You, Murray, attribute too much to the power of reason; your discovery that there is a nature goes too far; you are exaggerating; and at the end what you are constructing is an ideology of some sort. All of these things, I think, ought to be brought out if we are going to argue the question. But it is no good to say, "I don't like your theory and I don't think I would like the kind of world it would produce." And then, when I start to discuss that world and it seems to me I meet with no difficulty, suddenly the ground shifts somewhere else.

GOLDMAN: You are skipping the kind of world it may be. It would be the kind of world in which one kind of philosophy would be right.

MURRAY: That would be purely a world of intellect.

GOLDMAN: In your world of intellect there is no philosophy except this.

STOVER: Do you look forward to the day, Mr. Goldman, when this society is ruled entirely by consensus?

GOLDMAN: I think it has always been ruled by consensus.

STOVER: You asserted the opposite view earlier when you said that under the second face of federalism the only crucial difference between tyranny and non-tyranny was whether there was consensus. If there is consensus, you don't have tyranny, no matter what the government does.

GOLDMAN: I said you wouldn't need it.

STOVER: Would this give you any guidance in dealing with Justice Douglas's problems in determining whether or not it is correct, right, good, to extend the loyalty security program, to change the restrictions of due process, to permit the extension of search and seizure, etc., if the entire populace and all of the contending forces and groups in it were agreed that these were good things to have happen? Would you have any standard by which their agreement could be judged, or would you just have to accept this?

GOLDMAN: I don't see what the first part of your statement has to do with the second part. The cultural tradition to which I belong likes to remove certain rights and privileges from the consensus of the majority, or of the minority, or of anything else. These are the problems that have to do with the Bill of Rights. Beyond that, when you get to economic and political questions, I believe it is good for our legislative and judicial functions to take into account what they feel to be the consensus. I believe it is not only good but that, by and large, they have done it, which explains why over the years you get the swings back and forward.

STOVER: Why, in your cultural tradition, should certain rights and immunities of the individual before the state be removed from possible change by consensus?

GOLDMAN: Because I think that we Americans have gone through a particular set of experiences which resulted in our developing the conviction that we want to remove some things from the control of a consensus or a majority or a government.

BURDICK: Isn't your argument really that for practical reasons you want to exempt these things, not on a moral basis, but simply because you think the system works better and because we discovered this on empirical grounds?

GOLDMAN: Basically, yes.

HOFFMAN: I would like to ask Father Murray whether he thinks the problem of technology, as the Chairman's paper presents it, can be apprehended and given direction by the natural law.

MURRAY: I maintain that natural law theory would be very useful in this field, and in a very crucial sector, namely, the national defense establishment at the moment. Natural law would require that the processes of technology, specifically in the field of armaments and national defense, should be explicitly harnessed to the political purpose, which I doubt at the moment they are. There is an inversion of values here.

HOFFMAN: How much is man subject to technology, how much is he likely to become a different creature? That is, how extensive are the influences of technology in making a man the sort of creature who does not readily come to the kinds of judgments and learn the sorts of things he ought to learn according to natural law theory?

MURRAY: Well, natural law theory admits a thing that philosophically is called "second nature"; that is to say, the habits and customs that man builds up which themselves stand under judgment for their rationality on more basic principles of natural law theory. The fact of the matter seems to be that the process of political organization, its institutionalization, the problems that confront it, are enormously complicated today because of the technological increment in civilization. This has led certain people to the theory that we must transform politics into administration, that the community is to be administered and not governed. The natural law theorist, who is bound to be very conscious of fact and development and conditions, is obliged to cope with this. He is not allowed to abolish the machines and return society to a more primitive agrarian culture. The impulse of his theory might lead him to want to seek some sort of harmony between these two contrary exigencies of society, namely, for expertise, for efficient administration.

These complicated problems, which are of a particularly technical character, arise within a political community that still must, in order to be properly political, continue its existence on the basis of the liberal tradition of the West.

I hate to use the word again, because it can be misleading, but I think of the tradition that we have broadly subscribed to as that of the West. The natural law jurist would not consent to the proposition that politics from now on is simply administration. He would be confronted with the problem of developing his traditional principles to meet this particular situation. Law is, after all, the basic rational instrument for the management of society. It is the civilized instrument that man has developed for the government of himself as a social animal.

I think your natural law theorist would avoid extremes. This is one of his traits, for the theory gives you the habit of mental balance. He wouldn't favor an élite in the sense of the administrative élite nor would he retire to some ivory tower. He would try to get down in the dirty muddy stuff of contemporary history as it flows along the bed of the historical river and he would say, "What can I do to meet this problem?" His aspirations are always minimal, to see that the human values of the liberal tradition are somehow made operative in the technological world. His theory makes use of any practical conclusions that would meet the problem of technology in the broad sense.

BUCHANAN: Do you see anything in the concepts that we have of the technological system today that would indicate the mode in which you could apprehend natural law through that system? This is not asking for an application of the natural law to the technological system. It is saying that if the doctrine is true, we must be apprehending vaguely through this technological network something that is the natural law.

MURRAY: I would say that through science and technology today man has created a very particular kind of second nature. Secondly, that this second nature, if analyzed, would reveal to the philosopher, not necessarily to the scientist, teleology; that is, that this second nature operates for purposes of some sort. I grant the scientist that he need not be concerned with final causes, because they are not useful to him in the enterprise of science. Nonetheless, this second nature which technology has created for man was somehow conceived for purposes and exhibits tendencies that are some-

how inherent in technology itself. The tendencies, mind you, for the purposes of the argument I am constructing, may still be qualified as either good or bad, but they are tendencies. This is a dynamic process. This is proper nature in the Aristotelian sense; that is to say, it is a form of action that moves in particular directions. Whether these directions be chosen or controlled is a second question, but there is a processing going on here, and this processing has directions and terms, intermediate terms, further foreseeable terms, and so on. Therefore, this second nature exhibits the attribute of what I call the philosophy of teleology.

BROWN: What do you call first nature?

MURRAY: Man's total nature as it comes from the hands of God and as man historically discovered and developed it—natural tendencies toward freedom, toward justice, toward prosperity, toward a good family life.

BUCHANAN: Second nature applies to our system of habits.

MURRAY: Yes. The question in the issue of natural law which is before us is whether or not, somehow, man can find in his first nature the resources with which to cope with his new technological second nature. Does that make sense to you?

BUCHANAN: Yes, very much. You make the extremes very clear. In certain places I would like to see you emphasize it more. The ordinary man, the peasant, is aware of the truths of the natural law, and not in theory at all; he is always making judgments, and, on the whole, they square with the doctrine of natural law. At the other extreme you have your wise and honest people who know the theory and can therefore do some kind of thinking about it—highly analogical thinking. Suppose a society apprehends natural law. There would be certain modes in which this would appear. Historical conditioning would come in very strongly, so there would be a new formulation all the time. It doesn't violate the notion that there is a natural law to say that the knowledge of it will take extreme forms because of the different conditions under which human beings live. Is this your version of the consensus as always being true?

MURRAY: Take property, for example, in its full complexities within modern technology, where it is a highly involved concept, and the sheer juridical question is also highly involved. This raises the

practical question: What under the contemporary concepts of property can be considered mine? "Yours and mine" are very complicated when you try to apply them in this network of institutions, in which property is not what the medieval man thought it was.

BUCHANAN: Property is very difficult to define any more. I don't mean we can't, but it is very difficult to do.

MURRAY: You certainly cannot define property today by any deductive process from natural law.

BUCHANAN: Not deductive, but you want something that will square with it.

MURRAY: The natural law defines it. There are various legitimate ways of acquiring title to property so that things become mine juridically, and I can defend my title not only before the law but before the bar of my own conscience. This problem has become enormously complex in our contemporary society. How can I define what is mine?

BUCHANAN: Aren't we looking for a new formulation?

GORMAN: Maybe this example will help. Lawyer friends of mine have told me that their older teachers were extremely interested in jurisprudence and were shocked by modifications that occurred in their own time of the traditional principle about individual responsibility in the field of torts and by the whole development of collective responsibility and social insurance.

HUTCHINS: The most interesting item is liability without fault.

GORMAN: I am trying to suggest that this was a transformation politically and socially and in jurisprudence. But Mr. Buchanan might say that the very condition of industrial development—the set-up of the technology— was what actually forced a new insight into what is just in the field of torts. It wasn't merely that there was an adjustment to new circumstances but rather that those circumstances brought the appearance of a new insight on the level of natural law itself. Mr. Buchanan might say that the continuing and more complicated technological situation may similarly bring new advances in thinking about justice.

BUCHANAN: Exactly.

MURRAY: In St. Thomas the challenge is posited to the moral in-

sight, the possibility of the creation of further moral insight; and the necessity of new moral insight is always put to the human conscience or intelligence, moral reason, if you will.

You are saying more than this. You are saying that the situation somehow is making necessary not simply some rhetorical formulation of basic moral principles but the more ultimate re-formulation of these principles which ought to be brought to bear on this new situation to yield a new measure of moral insight. The principles themselves have to be altered.

BUCHANAN: I would say new knowledge of the natural law is coming about. I find myself half of the time very sympathetic with Goldman, although he doesn't know it, because if the natural law cannot be apprehended better than it is at present, then I don't want any of it. I am with Niebuhr at this point. If it goes on without biting into these new problems and without being affected by the historical developments we have, then I think it is hopeless. I am just hoping that it is capable of this adjustment.

MURRAY: I accept this.

BUCHANAN: I think the adjustment is needed. I can't say that you could wash out natural law and make a new one, but there should be a new insight.

MURRAY: I agree at this point that the theory of natural law has not been adequately developed so that you can put the bite on many of the situations that confront us today.

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